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speech, free exercise, equal protection, and substantive due process doctrines, as described in Part I, that would rule out the Basic Structure but support the latter proposition. I will not belabor matters by re-discussing the doctrines here. It might further be objected that, although X can have a valid constitutional claim and still be constitutionally sanctionable under a different description, this does not strictly entail that X can be a moral wrongdoer under another description. For example, one can imagine a regime in which X's constitutional right entails that his action was not malum in se, but permits his action to be malum prohibitum. Again, I see absolutely nothing in free speech, free exercise, equal protection, or substantive due process doctrines that draws this distinction, and so the stylized actors here perform actions that are malum in se. This assumption will be significant at certain points below. See infra text accompanying notes 193-97.

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The Flag Desecration Case: A rule provides that "no person shall desecrate a flag of the United States." n156 It violates the actor's free speech rights to be sanctioned pursuant to this rule. It turns out that actor was, by his very action, a batterer, polluter, and arsonist.

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n156. See Texas v. Johnson, 491 U.S. 397 (1989) (holding flag-desecration statute unconstitutional under Free Speech Clause).

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The Residential Picketing Case: A rule provides that "no person shall picket a residence or dwelling, except for persons [*42] engaged in labor picketing." n157 It violates the actor's free speech rights to be sanctioned pursuant to this rule. It turns out that the actor trespassed upon the resident's property and used threatening language while picketing.

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n157. See Carey v. Brown, 447 U.S. 455 (1980) (holding unconstitutional, under Free Speech and Equal Protection Clauses, statute that prohibited residential picketing but exempted labor picketing). Residential Picketing is meant to exemplify the special portion of free speech case law, evident in Carey and most recently in the majority opinion in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), where the Court finds an underinclusive rule to violate free speech rights.

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The Child Pornography Case: A rule provides that "no person shall display a photograph of a naked child." n158 It violates the actor's free speech rights to be sanctioned pursuant to this rule. It turns out that the actor was a child pornographer.

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n158. See supra note 88 (citing child pornography cases). The Court, in these cases, has upheld rules targeted at child pornography, by virtue of their

being narrower than the hypothetical rule in Child Pornography. If the reader doubts that the Court would, indeed, find the hypothetical rule to be overbroad, then the reader can replace it with a yet broader rule - for example, a rule prohibiting any pictures of "unclothed" children, with unclothed defined prophylactically to include, e.g., the lack of clothing over torsos or thighs.

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The Alcohol Cases: A rule provides that "no male [or no female, or no black person] between the ages of eighteen and twenty-one shall purchase alcohol." n159 (The rule supplements a background prohibition on the purchase of alcohol by any person under eighteen.) It violates the actor's equal protection rights to be sanctioned pursuant to this rule. It turns out that the actor used a stolen credit card to purchase alcohol.

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n159. See Craig v. Boren, 429 U.S. 190 (1976) (holding gender-discriminatory ban on beer sales unconstitutional under Equal Protection Clause).

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The Animal Sacrifice Case: A rule provides that "no person shall kill animals for religious purposes." n160 It violates the actor's free exercise rights to be sanctioned pursuant to this rule. It turns out that the actor killed an endangered animal protected by an endangered species statute (for example, a panda, cougar, or eagle) that the actor had stolen from a zoo.

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n160. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding unconstitutional, under Free Exercise Clause, ordinance that prohibited animal killing and was targeted at Santeria religion).

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The Abortion Case: A rule provides that "no person shall procure an abortion." n161 It violates a woman's substantive due process rights to be sanctioned pursuant to this rule. It turns out that she procured an abortion by threatening to kill the [*43] physician who performed the procedure, if he declined to do so.

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n161. See Roe v. Wade, 410 U.S. 113 (1973) (holding unconstitutional, under substantive component of Due Process Clause, statute generally prohibiting the procuring of abortions).

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Any moral theory of constitutional rights, whether the Direct Account or some other account, will need to explain the Basic Structure of constitutional rights that these stylized cases are meant to exemplify. Sanctioning X pursuant to rule R, by virtue of some action that X has performed, can violate X's constitutional rights even if X's very action bears proscribable properties (other than those

picked out by R) such that sanctioning X for that very action pursuant to a different rule is not unconstitutional. To say that X's sanction pursuant to R is "unconstitutional," or that it "violates X's constitutional rights," does not entail (1) that X's action is not constitutionally proscribable under any description. But according to the Direct Account, to say that X's sanction is "unconstitutional," or that it "violates X's constitutional rights," does entail (2) that there exists moral reason for a court to overturn X's sanction, independent of further invalidating the rule R pursuant to which X has been sanctioned. The key puzzle, for the defender of the Direct Account, is to explain why the latter proposition holds true even when the first proposition does not.

Let me clarify what it means to say that the flag-desecrator's action in The Flag Desecration Case turns out to have been an action of battery or polluting the environment, that the photo- displayer's action in The Child Pornography Case turns out to have been pornographic, that the residential-picketer's action in The Residential Picketing Case was also trespassory, and so on. I do not mean that the reviewing court reliably knows about these further, proscribable properties of the rights-holder's action. To assume that would be ungenerous to the Direct Account, for as we shall see in a moment, one possible defense of the Account is epistemic - a defense that trades upon the limited epistemic capacities of reviewing courts. n162 Rather, I simply mean that the relevant action truly had those additional properties.

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n162. See infra section II.A.2 (discussing epistemic defense of Direct Account).

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Relatedly, the stylized examples of constitutional rights assume that the actor is sanctioned under the wrong rule - the rule prohibiting "flag desecration," "residential picketing," "photo display," etc. - instead of being sanctioned pursuant to a rule prohibiting "battery," "trespass," "obscenity," etc. Let us place to one side the double jeopardy issues that might arise where the flag-desecrator, etc., is sanctioned for the very same action pursuant to multiple [*44] rules, either seriatim or simultaneously. n163 A so-called theory of constitutional rights which is, in truth, merely an addendum to double-jeopardy doctrine is too weak to be a satisfactory theory. Constitutional rights to free speech, equal protection, free exercise, and substantive due process function, in practice, as protection for rights-holders quite independent of the Double Jeopardy Clause - that is, as protection against being sanctioned pursuant to the wrong rule R even if R is the sole rule that the state deploys against the rights-holder. n164

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n163. See generally Moore, supra note 64, at 325-55 (discussing problem of deciding whether two different rules, pursuant to which a person is sanctioned for the very same act- token, pick out the same or different act-types for double-jeopardy purposes).

n164. A recent case that clearly illustrates this point is McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) (striking down fine pursuant to law

prohibiting distribution of anonymous campaign literature, as violating free speech). Other exemplary cases are: Texas v. Johnson, 491 U.S. 397 (1989) (free speech); In re R.M.J., 455 U.S. 191 (1982) (free speech); Loving v. Virginia, 388 U.S. 1 (1967) (equal protection); Griswold v. Connecticut, 381 U.S. 479 (1965) (substantive due process). See also Wisconsin v. Yoder, 406 U.S. 205 (1972) (free exercise under pre-Smith regime). I should also note the following, reciprocal point. Where X's sanction pursuant to one rule violates the Free Speech, etc., Clause, and is overturned on constitutional grounds, sanctioning him for the very same action pursuant to a different rule will not constitute double jeopardy - regardless of the similarity between the invalid and valid rule under ordinary double jeopardy doctrine. See Montana v. Hall, 481 U.S. 400, 402 (1987) (double jeopardy does not bar reprosecution where conviction overturned, on grounds other than sufficiency of the evidence, on appeal).

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Can the Direct Account explain why it is unconstitutional to sanction, solely for "flag desecration," the flag-desecrator who also was a batterer; why it is unconstitutional to sanction, solely for "residential picketing," the picketer who also was a trespasser; and so on? Let us see.

A. A Theory of Justified Sanctions

One might try to defend the Direct Account by invoking a general theory of justified sanctions - a general theory, such as an expressive theory, a deterrent theory, or a rehabilitative theory, that purports to set forth the necessary and sufficient conditions for a legal sanction to be morally justified, at least prima facie. n165 This [*45] is an attractive route for the defender of the Direct Account, because certain theories of justified sanctions are rule-dependent. Under certain theories, X's sanction is morally justified only if the predicate or history of the rule pursuant to which X is sanctioned meets certain conditions. For example, an expressive theory stipulates that a sanction, to be morally justified, must express what it was about the actor's conduct that made it wrong. n166 X must have been a (1) culpable (2) wrongdoer, and (3) the rule under which she is sanctioned must express that. An expressive theory of justified sanctions, or some other rule-dependent theory, seems a natural way for the constitutional theorist to explain why sanctioning X pursuant to rule R is morally problematic even though X's very action is properly sanctioned under a different rule. The problem with R, the explanation goes, is just that its predicate or history fails to meet the moral conditions set out by the rule-dependent theory of justified sanctions.

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n165. See R.A. Duff, Trials and Punishments 151-266 (1986) (surveying theories of punishment); Igor Primoratz, Justifying Legal Punishment (1990) (same); Nigel Walker, Why Punish? (1991) (same). Certain justified-sanction defenses of the Direct Account, such as Hampton's expressive theory, see infra text accompanying notes 171-75, are clearly most persuasive in explaining why the Direct Account might hold true of criminal sanctions. And my rebuttal to these defenses trades upon a theory of sanctioning - retributivism - which again is most germane to criminal sanctions. See infra text accompanying notes 179-201. Given the frequency with which the Court strikes down criminal sanctions or criminal-law duties, under the Free Speech, etc., Clauses, and given the absence of any distinction between civil and criminal rules in this

jurisprudence, see supra note 54, I suggest and henceforth assume that a would-be defense of the Direct Account which fails for criminal rules should be rejected.

n166. See generally Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591 (1996) (analyzing expressive theories of punishment); Igor Primoratz, Punishment as Language, 64 Phil. 187 (1989) (same); A.J. Skillen, How to Say Things with Walls, 55 Phil. 509 (1980) (same). Expressive theories of law, not just sanctions, have recently become salient in legal scholarship. See Larry Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995); Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725 (1998); Cass Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021 (1996).

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In considering whether a theory of justified sanctions, such as an expressive theory, can underwrite the Direct Account, we must keep separate two, crucially different ideas. The first idea is nonepistemic. The idea, here, is that the predicate or history of the rule pursuant to which a person is sanctioned truly matters, quite independent of the epistemic capacities of a constitutional reviewing court. It truly is not a matter of nonepistemic moral indifference whether the battering flag-desecrator is punished for "flag desecration" rather than "battery." It is simply a bedrock moral fact that she should be sanctioned under the right kind of rule. n167 [*46] Even if the reviewing court is epistemically reliable n168 - even if the court reliably knows that the flag-desecrator also was a batterer - it should still overturn the flag-desecrator's sanction under the flag- desecration rule.

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n167. The nonepistemic defense of the Direct Account, and indeed virtually every other defense I consider in this Part, as well as the Derivative Account I defend below, presumes that "moral facts" exist in the following sense: moral utterances, e.g., "X's sanction is deserved" or "X's sanction is not deserved" or "X's duty is unjust," constitute claims about the world that are generally true or false, as opposed to merely expressing some attitude on the speaker's part, such as a preference. The technical term for this view of morality as truth- stating is cognitivism. Cognitivism is to be distinguished from a stronger claim, realism, which states that the truth-content of moral claims is independent of society's conventions. See David Brink, Moral Realism and the Foundations of Ethics 1-36 (1989) (discussing, and distinguishing between, cognitivism and realism). Whatever the appeal of realism, none of the moral arguments mooted here - neither the ones I criticize, nor the ones I advance - presuppose it. All are consistent with some form of moral conventionalism. See Adler, supra note 4, at 803-04 (discussing varieties of conventionalism).

n168. See Adler, supra note 4, at 771-80 (distinguishing between arguments that point to epistemic or other deficits of constitutional reviewing courts, and arguments that point to content of moral criteria that reviewing courts enforce).

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The second, contrasting idea is epistemic. n169 One of the central functions of legal institutions, specifically the institutions that enact and then apply conduct rules, is to identify those actions whose performance is morally wrong. You, or I, or a fallible federal judge somewhere, cannot impose an imprisonment on X, or take away some of his money, merely because we believe that X performed wrong. Society needs to do more epistemic work - more work to assess the wrongfulness of his action - than that. Society does the epistemic work, principally, by enacting rules and then enforcing them. So even if it truly is a matter of nonepistemic moral indifference whether the battering flag-desecrator is sanctioned under one rule or the other - even if the predicate or history of the rule do not figure in the morally necessary nonepistemic conditions for a justified sanction - the reviewing court should overturn X's sanction for "flag desecration." The epistemically reliable way to determine whether his action was wrongful, by virtue of some property other than flag-desecration, is just for state officials to draft and try an indictment against him for some other offense.

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n169. By "epistemic," I mean pertaining to moral knowledge: knowledge of whether X's sanction is morally justified. Given cognitivism about morality, this idea is coherent. See supra note 167 (discussing cognitivism). I draw this epistemic idea from the epistemic strain in the scholarly literature on authority. Whether authoritative rules create reasons for belief or action, see Heidi Hurd, Challenging Authority, 100 Yale L.J. 1611, 1615-20 (1991) (explaining this distinction); infra text accompanying notes 282-88 (same), it is plausible to think that the rule's authority is at least partly grounded upon the moral expertise of the rule- formulator: her knowledge of what morality requires. See id. at 1667-77 (defending reason- for-belief account of legal authority, grounded upon epistemic capacities of legal institutions); Joseph Raz, The Morality of Freedom 38-69 (1988) (defending reason-for-action account of legal authority, grounded in part upon epistemic capacities of legal institutions).

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I will consider these two, importantly distinct ideas, nonepistemic and epistemic, in turn.

1. The Nonepistemic Idea

The nonepistemic idea is that the predicate or history of the rule pursuant to which a person is sanctioned has true moral significance for the justifiability of his sanction, independent of the epistemic capacities of reviewing courts. It is morally improper to sanction him pursuant to the wrong kind of rule - there is moral reason to [*47] overturn that sanction - in the same way that it is (or may be) morally improper to sanction him if his action was not wrongful, or if his state of mind was not culpable. n170

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n170. On the moral importance of wrongdoing and/or culpability in justifying sanctions, see generally Symposium, Harm v. Culpability: Which Should be the Organizing Principle of the Criminal Law, 5 J. Contemp. Legal Issues 1 (1994).

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How might this nonepistemic idea be fleshed out? One way, as I have already suggested, may be to defend an expressive theory of sanctions - the kind of theory that, most famously, Jean Hampton has defended. n171 On Hampton's view, the essence of punishment is to cancel the demeaning and injurious message that crime communicates.

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n171. See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659 (1992) [hereinafter Hampton, Correcting Harms]; Jean Hampton, An Expressive Theory of Retribution, in Retributivism and its Critics 1 (Wesley Cragg ed., 1992); Jean Hampton & Jeffrie Murphy, Forgiveness and Mercy 111-61 (1988). Hampton terms her theory an "'expressive' theory of retribution," Hampton, Correcting Harms, supra, at 1659, but I use the terms "retributivism" and "retribution" in this article to refer to the nonexpressive variant of that view, namely, that the morally culpable deserve punishment independent of what punishment expresses, with "punishment" itself construed not to entail some kind of expression. See Michael Moore, The Moral Worth of Retribution, in Responsibility, Character and the Emotions 179, 181 (Ferdinand Schoeman ed., 1987) (distinguishing between retributivist and "denunciatory," i.e., expressive, theories of punishment).

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[Punishment] is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity. What do I mean by "vindicating the value of the victim?" ... To vindicate the victim, a [punitive] response must strive first to re-establish the acknowledgement of the victim's worth damaged by the wrongdoing, and second, to repair the damage done to the victim's ability to realize her value. n172

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n172. Hampton, Correcting Harms, supra note 171, at 1686. Hampton actually uses the term "retribution" in this quotation rather than "punishment" -- thus the alterations -- both because she is developing an expressive variant of retributivism, see supra note 171, and because she wants her theory to cover nonpunitive as well as punitive responses to wrongdoing, see Correcting Harms, supra note 172, at 1685; but for the sake of a clear distinction between her theory and nonexpressive retributivism, I have altered the quotation and more generally describe Hampton as offering an expressive theory of punishment. This terminological point does not affect the substantive question here, namely, whether a theory such as hers can underwrite the Direct Account.

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Part of what makes a proper punishment morally appropriate is what the

punishment says: it says that the wrongdoer is not superior to the victim. n173

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n173. To be sure, a mere statement does not constitute the kind of "expression" that Hampton's theory warrants and demands. Rather, it warrants and demands hard treatment for the wrongdoer that is also expressive treatment. See id. at 1686-87 ("Re-establishment of the acknowledgement of the victim's worth is normally not accomplished by the mere verbal or written assertion of the equality of worth of wrongdoer and victim.... [Rather] we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish ....").

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[*48] In developing her expressive theory, Hampton does not, of course, mean to defend the Direct Account. Her theory is a theory of punishment, not a theory of constitutional law. But the defender of the Direct Account might try to employ Hampton's theory, or more broadly the kind of expressive theory that Hampton's epitomizes, for his own purposes. He might say that the rule pursuant to which X is sanctioned must, inter alia, pick out the wrong-making property of X's action. The rule must do that, because the very point of punishing X is to point out - to X, the victim, and the broader community - that X was not free to inflict that type of action upon a moral equal. n174 This is a possible route for the defender of the Direct Account, because a common failure among some of the rules in our stylized examples - particularly Flag Desecration, Child Pornography, and Abortion - is that these rules fail to describe (or fully describe) wrong-making properties of actions. n175 Burning a flag is not wrong because it desecrates the flag; it is wrong because the burning batters a bystander, pollutes the air, etc. Displaying a sexually explicit picture of a child is not wrong just because the child is unclothed; it is wrong because the picture is sexually explicit and exploitative. Procuring an abortion, by means of a coercive threat, is not wrong because the actor procures an abortion; it is wrong because she procures something by means of a coercive threat.

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n174. See id. at 1677 (arguing that "a wrongful action that produces moral injury and which merits retributive punishment is an action that has a certain kind of meaning," viz., that the wrongdoer is morally superior to the victim).

n175. See infra text accompanying notes 203-04 (further explicating how rules in Flag Desecration, Child Pornography, and Abortion underdescribe wrong-making features of actions). The remaining stylized rules are not morally underdescriptive in the same way, see infra text accompanying notes 216-17, and so the expressive defense of the Direct Account, as well as the deterrent theory discussed immediately below, is most persuasive with respect to Flag Desecration, Child Pornography, and Abortion.

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Another kind of theory of justified sanctions that the defender of the Direct Account might try to turn to her advantage is the kind of deterrent theory developed by Larry Alexander, Daniel Farrell, and Warren Quinn. n176 Although Alexander's, Farrell's, and Quinn's specific theories differ in their details,

the general idea behind these theories is to ground the justifiability of (ex post) sanctions upon the justifiability of (ex ante) deterrent threats. We are [*49] justified in inflicting a setback on a wrongdoer if and only if we justifiably threatened him with that setback, prior to the wrongdoing. Farrell, for example, argues in favor of the following principle:

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n176. See Warren Quinn, The Right to Threaten and the Right to Punish, in Morality and Action 52 (1993); Lawrence Alexander, The Doomsday Machine: Proportionality, Punishment and Prevention, 63 Monist 199 (1980); Daniel M. Farrell, The Justification of Deterrent Violence, 100 Ethics 301 (1990).

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When my situation is such that either (i) I enforce a conditional threat of retaliation that I have previously and justifiably made, thereby protecting myself from a decrease in my credibility and hence from an increase in my vulnerability or (ii) I do not enforce the relevant threat, thereby jeopardizing my credibility and hence increasing my vulnerability to aggression I might otherwise have deterred, I am entitled to choose (i) over (ii), provided that the penalties thus threatened and imposed are within certain limits and are directed only at offenders for offenses. n177

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n177. Farrell, supra note 176, at 316.

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How might the defender of the Direct Account develop this kind of deterrent theory, for her own purposes? She might say something like this: Sanctioning X pursuant to a particular rule is justified only if enacting the rule - issuing that particular coercive threat to X and others, not to perform the type of action identified in the rule - was justified. For if enacting the rule was justified, then sanctioning X is justified as a way to maintain the credibility of the particular deterrent threat embodied in the rule. But enacting the rules in cases such as Flag Desecration, Child Pornography, and Abortion was not justified, because these rules encompass plenty of harmless actions. n178 We have moral reason to maintain the credibility of our deterrent threats against "batterers," etc., but we do not have moral reason to maintain the credibility of our deterrent threats against "flag desecrators," etc. Thus we have true, nonepistemic moral reason to sanction the battering flag-desecrator pursuant to a rule that prohibits battery rather than pursuant to a rule that prohibits flag-desecration, and the same is true for the other stylized cases.

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n178. See infra text accompanying notes 315-53 (discussing how rules in these cases go morally awry in including innocent actions within their scope).

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But the difficulty with this kind of defense of the Direct Account - a nonepistemic defense based upon a rule-dependent theory of sanctioning, such as Hampton's expressive theory or the Alexander/Farrell/Quinn deterrent theory - is that the would-be defender must overcome the following, retributivist objection. As Michael Moore explains:

Retributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it. Retributivism thus stands in stark contrast to utilitarian views that justify punishment of past offenses by the greater good of preventing future offenses. It also con [*50] trasts sharply with rehabilitative views, according to which punishment is justified by the reforming good it does the criminal. n179

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n179. Moore, supra note 171, at 179; see also Michael S. Moore, Justifying Retributivism, 27 Israel L. Rev. 15 (1993). An updated version of Moore's well-known article on The Moral Worth of Retribution, supra note 171, is Michael Moore, Placing Blame ch. 3 (1997).

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For the retributivist, "moral culpability" is not only a necessary condition for a punitive sanction - something that an expressive theory or the kind of deterrent theory discussed here does not mean to deny n180 - but it is a sufficient condition as well. n181 The actor's "moral culpability" is sufficient to justify punishing him, independent of any further good that punishment may secure: specifically, independent of the role of punishment in preventing future wrongdoing, rehabilitating the criminal, or expressing social condemnation. n182

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n180. See, e.g., Hampton, Correcting Harms, supra note 171, at 1686 (stating that "retribution is a response to a wrong"); Farrell, supra note 176, at 316 n.9 (stating that the principle justifying the carrying out of deterrent threats "is meant to apply only to ... threats to harm those who do an innocent person wrong").

n181. See Moore, supra note 171, at 181-82 ("Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it. Moral culpability ('desert') is in such a view both a sufficient as well as a necessary condition of liability to punitive sanctions." (footnote omitted)).

n182. See id. at 180-81 (distinguishing retributivism from utilitarian, "denunciatory" (i.e., expressive), and other theories of punishment).

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Thus, the retributivist might object as follows to the Direct Account: There is simply no nonepistemic reason to overturn the actor's own sanction, independent of further invalidating the rule under which it falls, in cases such as Flag Desecration, Child Pornography, and Abortion as well as Residential Picketing and Animal Sacrifice. The battering flag-desecrator, etc., was a culpable wrongdoer, and that suffices to justify his sanction, whatever the predicate or history of the underlying rule. To be sure, there is reason to repeal or amend the flag-desecration rule, etc. - because some flag-desecrators, etc., are not wrongdoers under another description - but it remains a matter of (nonepistemic) moral indifference whether in Flag Desecration the state chooses to sanction the battering flag-desecrator for "battery" or "flag desecration," and similarly in Child Pornography, Abortion, Residential Picketing, and Animal Sacrifice. And although the Direct Account may hold true for Alcohol, that is not because of a general theory of sanctions, such as an expressive or deterrent theory. Rather, the Direct Account may hold true here because of quite separate considerations of equality. Sanctioning a black person who uses a credit card to purchase alcohol, pursuant to a racially discriminatory rule, is concededly wrong - but [*51] not because retributivism is wrong. It is wrong because, whatever the correct theory of sanctions, imposing a legal burden upon someone or depriving him of a legal benefit under the description "black" is a serious insult and stigma. n183

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n183. See infra section II.B.2 (discussing stigma theory of Equal Protection Clause).

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How might the would-be defender of the Direct Account reply to the retributivist objection? First, she might try to show that retributivism is wrong on the merits. This is a tall order. The debate between retributivist and non-retributivist theories of punishment has raged on for centuries, and in recent years there has been a real revival of interest in retributivism, among moral philosophers, n184 as part of a general revival of non-utilitarian theorizing most famously exemplified by John Rawls's A Theory of Justice. n185 To defeat retributivism, the defender of the Direct Account would either need to demonstrate the truth of utilitarianism (the view that overall well-being is the sole criterion of moral rightness); n186 or she would need to show that, despite the existence of principles of justice constraining or coexisting with the principle of maximizing overall well- being, the retributivist principle (that a morally culpable actor deserves punishment) is not among the true principles of justice. Proving the truth of utilitarianism is obviously a daunting task. n187 And the non-utilitarian approach to defeating retributivism is little less daunting, given that the retributivist principle coheres with our concrete judgments n188 at least as well as the principle that a tortfeasor has a duty to repair the losses that his tortious conduct [*52] occasioned, n189 or that promisors are morally obliged to keep their promises, n190 or that social and economic inequalities should work to the benefit of the least well-off. n191 Indeed, in its jurisprudence directly addressing the content and justification of punishment, such as its Eighth Amendment and double jeopardy jurisprudence, the Supreme Court has for some time said quite consistently that retributivism is a constitutionally acceptable and standard theory of punishment. n192

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n184. See David Dolinko, Some Thoughts about Retributivism, 101 Ethics 537, 537 (1991) (noting "a dramatic change in the regard in which courts and legislators hold the doctrine of retributivism" and the fact that "this shift on the part of official legal sentiment parallels a shift in the views of philosophers and legal scholars"); Heidi M. Hurd, What in the World is Wrong?, 5 J. Contemp. Legal Issues 157, 157 n.1 (1994) (citing scholars who defend retributivism).

n185. John Rawls, A Theory of Justice (1971). As Moore notes: "Retributivism ... joins corrective justice theories of torts, natural right theories of property, and promissory theories of contract as deontological alternatives to utilitarian justifications ...." Moore, supra note 171, at 182.

n186. See Scarre, supra note 46, at 4 (noting that utilitarian moral theories have generally been "welfarist, consequentialist, aggregative and maximising").

n187. See Scarre, supra note 46, at 152-204 (summarizing criticisms of utilitarianism). Probably the most famous critiques of utilitarianism, in the modern literature, are those advanced by Bernard Williams, see Bernard Williams, A Critique of Utilitarianism, in J.J.C. Smart & Bernard Williams, Utilitarianism: For and Against 77 (1973), and, of course, by Rawls, see Rawls, supra note 185, at 150-92.

n188. See Moore, supra note 171, at 183-85. For a recent explication and defense of coherentism in moral reasoning, specifically the Rawlsian idea of "reflective equilibrium" that gives place to judgments about concrete cases as well as to general principles, see Norman Daniels, Justice and Justification: Reflective Equilibrium in Theory and Practice 1-17 (1996).

n189. See Jules Coleman, Risks and Wrongs 303-28, 324 (1992) (describing and defending "mixed conception" of corrective justice institutionalized by tort law, such that "the duty of wrongdoers in corrective justice is to repair the wrongful losses for which they are responsible").

n190. See Charles Fried, Contract as Promise 1 (1981) (arguing that "the promise principle ... is the moral basis of contract law"); id. at 17 (arguing that breaching promises is morally wrong "by virtue of the basic Kantian principles of trust and respect").

n191. See Rawls, supra note 185, at 83.

n192. This goes back, at least, to Gregg v. Georgia, 428 U.S. 153 (1976). See 428 U.S. at 183 (" 'Retribution is no longer the dominant objective of the criminal law,' but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men.") (opinion of Stewart, Powell, and Stevens, JJ.) (citation omitted). For recent statements, see, e.g., Austin v. United States, 509 U.S. 602, 621 (1993) (deciding whether civil forfeiture constitutes "punishment" for purposes of Excessive Fines Clause) (" 'lb;A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " (alteration in original) (quoting United States v. Halper, 490 U.S. 435, 448 (1989))); Foucha v.

Louisiana, 504 U.S. 71, 80 (1992) (striking down civil-commitment statute on due process grounds) ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution."); Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997) (upholding civil-commitment statute for "sexually violent predators") (describing "retribution" and "deterrence" as twin purposes of criminal punishment); and Hudson v. United States, 118 S. Ct. 488, 493 (1997) (describing factors that are useful in determining whether a penalty is "criminal" for double-jeopardy purposes) ("The factors include whether its operation will promote the traditional aims of punishment-retribution and deterrence.' " (citation omitted)).

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Note that the defender of the Derivative Account does not need to prove retributivism to be true. All she needs to say is that, whatever the truth of retributivism, she has a morally impeccable and straightforward explanation for the content of constitutional rights under the Free Speech, Free Exercise, Equal Protection, and Due Process Clauses. The moral content of a constitutional right is that some rule should be repealed, whether or not retributivism is true - for example, because the rule coerces persons not to perform certain types of innocent actions, such as mere flag- desecration. By contrast, the defender of the Direct Account needs to provide not only an explanation why these rules go wrong - why they are not deterrent threats worth maintaining, or proper expressive mechanisms - but in addition must show that retributivism is wrong on the merits. So the serious arguments for retributivism undermine the moral plausibility of the Direct Account; but [*53] the serious arguments against retributivism do not undermine the moral plausibility of the Derivative Account.

Another tack the defender of the Direct Account might take is to bracket the truth of retributivism, but then argue that the retributivist principle of punishing the morally culpable does not justify the sanctions meted out in the stylized cases above. Yet why not? The retributivist principle, again, is that moral culpability is not only necessary but sufficient to justify punishment. n193 I suggest that the actors, in all the stylized cases above, satisfy this principle. They are "morally culpable" because they have culpably n194 committed serious wrongs: n195 battery, pollution, and arson; assault and trespass; child pornography; fraud; the killing of a stolen and endangered animal; assault with a deadly weapon. The epistemic point - that X's having been tried and convicted for flag-desecration, etc., fails to evidence his moral culpability, qua batterer, etc. - should not obscure the moral fact that X committed wrong. He performed an action that breached some other rule and that, quite apart from that, ought not have been performed. (Even if, by some mistake, the rules against battery, etc., had temporarily been repealed in the relevant jurisdictions, it was wrong of X to do what he did. n196) In addition, the sanctions that the actors actually received are, I suggest, "punishment," although this is admittedly open to some debate. n197

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n193. See Moore, supra note 171, at 181-82.

n194. I mean to assume this in the stylized facts.

n195. It is open to debate whether the "moral culpability" sufficient to warrant punishment, within a retributivist theory, entails wrongdoing,

culpability, or both. See Symposium, Harm v. Culpability, supra note 170. Further, it is open to debate whether the retributivist's "wrongdoing" entails only harmful action, or whether it includes harmless wrongs as well, or even mere illegality. See Feinberg, supra note 57, at 10-14 (summarizing considerations, besides harmfulness, that support a criminal prohibition on certain actions); Moore, supra note 171, at 181 n.1 (defining moral culpability as including morally innocent actions that are legally prohibited). Whatever the boundaries of moral culpability, for retributivist purposes, our stylized actors lie within that concept's core.

n196. Only a super-shallow conventionalist would claim that X's action cannot be morally wrong unless prohibited by a formal legal rule. See Adler, supra note 4, at 803-04 (discussing, and criticizing, super-shallow conventionalism).

n197. See Duff, supra note 165, at 151 ("Punishment ... must logically be imposed on an offender, for an offence, by a duly constituted authority, and must inflict suffering on him." (emphasis added)). Notably, however, Duff offers this definition of punishment in the service of an expressive account, see id. at 267.

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Finally, the temptation to amend the retributive principle and insist that morally culpable actors must receive punishment for the right reasons should be resisted. For how would a "right reasons" addendum be defended, within a retributivist theory? The retributivist principle expresses (part of) what is morally fitting: it is fit [*54] ting, the retributivist claims, that wrongdoers receive the punishment they deserve. A legal practice that tends to realize the morally fitting events or states-of-the-world identified by the retributivist principle is, for the retributivist, a justified practice; a legal practice that tends not to realize those events or states is, for her, less well justified. So the practice of enforcing a rule against "batterers" is better justified than the practice of enforcing a rule against "flag desecration." n198 But this is not because the retributivist wants to punish batterers "for the right reasons;" it is because batterers are usually wrongdoers, while flag-desecrators often are not. We might, perhaps, have a general theory why legislators should act for the "right reasons" (a theory of authority, or of legislative motivation, of the kind considered below) n199; but a specific "right reasons" addendum to the retributivist principle is simply ad hoc, just as a specific "right reasons" addendum to, say, the Rawlsian principle of redirecting resources to the less-well-off would be.

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n198. On the general distinction between the moral justifications for a practice and the moral justifications for a particular application of that practice, see John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3, 3 (1955); Schauer, supra note 58, at 128-34.

n199. See infra section II.C; infra note 278. Cf. Moore, supra note 179, at 751 (arguing that "every citizen [has the right] not to have his or her behaviour regulated for the wrong reasons by the government," but that such right "is not basic but is the correlative of a more basic duty on the part of legislators to enact legislation for certain reasons but not others").

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Is there anything left for the defender of the Direct Account to say, in response to the retributivist? I suppose she might say this: although the sanctions meted out in our stylized cases do, indeed, satisfy the conditions for punishment specified by the retributive principle - in this important sense, no wrong has been done to the actors - it would still be a good idea to sanction them pursuant to different rules. Doing so would not only dispense the punishment they deserve, but additionally would express what made their actions wrong, or maintain the credibility of justified threats against future wrongdoers. Yet I find it hard to see how this final defense of the Direct Account coheres, in any way, with the moral concepts underlying our stylized cases, particularly Flag Desecration, Child Pornography, and Abortion. Surely the constitutional rights to free speech and abortion do not rest upon the moral claims of the once and future victims of wrongdoing speakers and of wrongdoing women who procure abortions! It is much more straightforward and plausible to say what, as we shall see, the Derivative Account says: that the constitutional rights to free speech and abortion typically rest upon the moral claims of otherwise- innocent speakers and women, who fall within the scope of overly [*55] broad rules such as the rules in Flag Desecration, Child Pornography, and Abortion. n200

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n200. See infra section III.A.1.

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Note, finally, that a nonepistemic defense of the Direct Account based upon a rule-dependent theory of sanctions must overcome, not just retributivism, but every other rule-independent theory of sanctions. Retributivism is one such theory; it may not be the only one. n201 Because I think the retributivist's objection is sufficiently powerful to defeat the nonepistemic defense of the Direct Account, I will not pursue the point here. My burden is merely to adduce one constitutionally satisfactory, rule-independent theory of justified sanctions - retributivism - that justifies the sanctions imposed in Flag Desecration, Abortion, and the rest of our stylized cases. By contrast, a nonepistemic defense of the Direct Account must demonstrate that there exists no constitutionally satisfactory, rule-independent theory sufficient to justify the sanctions in the stylized cases. If the defender of the Direct Account refutes retributivism, then she must proceed to defeat whatever other rule- independent theories might plausibly obtain.

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n201. For example, consider an incapacitative theory: imprisoning X, who has performed wrongdoing in the past, serves to incapacitate him and thereby prevent his future wrongdoing quite independent of the predicate or history of the particular rule pursuant to which X is sanctioned. See Walker, supra note 165, at 34-41 (discussing incapacitative theory).

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2. The Epistemic Idea

The nonepistemic defense of the Direct Account, sketched above, tries to show why the predicate or history of the rule pursuant to which an actor is sanctioned has true moral significance for the justifiability of her sanction, independent of the epistemic capacities of reviewing courts. The defense tries to demonstrate why sufficient nonepistemic reason obtains to invalidate X's own sanction, without a further invalidation of the rule, and despite the fact that X has culpably committed a wrong by the very action for which she has been sanctioned. The epistemic defense is less ambitious. The idea here is that, whatever wrong X happens to have performed, she has not been tried and convicted for that. Rather, she has been tried and convicted for breaching a rule that (in some way) n202 does not serve as an epistemically reliable mechanism for identifying wrongful actions. And the right way for society to determine whether X, indeed, performed a wrong is simply to indict and [*56] try her for violating a rule that is not epistemically flawed in this way. n203

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n202. "In some way" is meant to anticipate the different, specific ways that sanctioning X pursuant to a rule may fail to constitute adequate epistemic work. See infra text accompanying notes 203-19 (discussing epistemic<1> rights and epistemic<2> rights).

n203. Indeed, nothing I say in this section is meant to deny the general proposition that rules have an epistemic function. See supra note 169 (discussing epistemic idea, within literature on authority). Whatever else rules do - whether that is solving coordination problems, or prisoners' dilemmas, or coercing morally apathetic actors to do what morality requires - I find it compelling to think of agencies and legislatures as institutions that, among other things, perform the epistemic work needed to determine what morality (particularly the consequentialist component of morality) requires of actors in certain domains. See Raz, supra note 169, at 38-69 (presenting theory of authority, grounded both on moral expertise of authorities and on role of authoritative utterances in solving coordination problems and prisoners' dilemmas). I simply do not think that the epistemic idea is an adequate account of constitutional rights to free speech, free exercise, equal protection, and substantive due process.

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The following formulation takes an initial stab at the epistemic idea:

Epistemic<1> Rights: Underdescriptive Rules

To say that X's sanction pursuant to rule R is "unconstitutional," or that it violates her "constitutional rights," is to say that X has a legal right to have more epistemic work performed (specifically, by trying her under a different rule), prior to imposing a sanction upon her. More epistemic work is needed because the rule is underdescriptive. Some (or many) actions falling within the description set forth by the rule's predicate are morally innocent; relative to that description, X's action was not necessarily (or probably) wrongful.

Flag Desecration, Child Pornography, and Abortion motivate this idea of "underdescriptive" rules - rules whose scope includes some or many morally innocent actions. A given action of "flag desecration," or "procuring an abortion," or "displaying photos of naked children" is not necessarily or

likely wrongful. Thus, even if retributivism is true - even if an actor's wrongdoing truly suffices to justify a sanction, regardless of the predicate or history of the rule pursuant to which X is sanctioned - society has not yet done enough to identify the properties of X's action that make it wrong. To say that X has a "constitutional right" not to be sanctioned pursuant to a rule prohibiting "flag desecration," "abortion," or "photo display" could simply entail that her sanction is possibly or likely unjustified, relative to the act-description set forth by the predicate of the targeted rule. Even the retributivist can accept this construal of X's constitutional right, for even the retributivist does not want to sanction innocent actors. Whatever our underlying theory of sanctions, we can all agree that, in cases such as Flag Desecration, Child Pornography, and Abortion, we need to [*57] undertake more epistemic work to determine whether X's action was wrongful.

We must carefully distinguish this plausible idea of epistemic<1> rights from a different idea, with which it might be confused, and which is not plausible at all. That is the following:

The Implausible Epistemic Idea: Substantive Rights Based on Limited Evidence

To say that X's sanction pursuant to rule R is "unconstitutional," or that it violates her "constitutional rights," is to say that X has a legal right not to be sanctioned by virtue of the action she performed. The moral content of the legal right is as follows: there is true, moral reason not to sanction X by virtue of the action she performed, or so the reviewing court has determined on the evidence before it. The reviewing court has determined that such moral reason obtains, because it has concluded that X's action was not wrongful. The court has concluded that X's action was not wrongful because, relative to the description embodied in the targeted rule, it was not wrongful.

This latter explanation is implausible, of course, because it squarely contradicts the Basic Structure. If X's constitutional right were a legal right not to be sanctioned, under any rule, for the action she performed, then the flag-desecrator, etc., whose sanction was invalidated on First Amendment, etc., grounds could not subsequently be sanctioned under any rule: a rule prohibiting battery, obscenity, or assault with a deadly weapon. Relatedly, if constitutional rights had this act-shielding structure, we would want reviewing courts to engage in considerably more investigation of the potentially wrong-making features of actions, beyond the features picked out by a particular rule. n204

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n204. Perhaps it might be objected that the state's failure to prosecute X pursuant to a second rule is itself strong grounds for an inference that X's action has no further wrong- making properties. But such an inference is unwarranted, given the structure of double- jeopardy doctrine. See Moore, supra note 64, at 325-55 (double jeopardy permits the sequential prosecution of an actor, for the very same action, pursuant to statutes picking out different act-types).

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So let us return to the more plausible notion - that constitutional rights are epistemic<1> rights. An epistemic<1> right is a right of some sanctioned X

to have more epistemic work done, given that the rule R pursuant to which he has been sanctioned is underdescriptive - given that an action is not necessarily or likely wrongful, merely by virtue of falling under the description set forth by R. The idea of epistemic<1> rights is plausible because it is consis [*58] tent with the Basic Structure. Sanctioning you for "procuring an abortion" violates your epistemic<1> rights because society has not, yet, reliably determined whether you did something wrong; sanctioning you for "assault with a deadly weapon," by virtue of the very same action, does not violate your epistemic<1> rights, because now society has reliably determined your wrongdoing. Further, as I have said, the explanation is quite consistent with retributivism. Its defender can concede that if X's action of procuring an abortion also was an action of assault with a deadly weapon - indeed, if in the past X performed a wrongful action, and no fitting punishment has yet been produced to match that - then her sanction might be (nonepistemically) justified. The very point of a constitutional right, the defender can say, is to require that our legal institutions do the epistemic work needed to determine the true properties of X's action or prior actions. Finally, and relatedly, the idea of an epistemic<1> right fits nicely with the notion that legal institutions have different and limited roles. The limited role of the legislature or agency is to enact rules that, inter alia, purport to describe wrong-making features of actions; the limited role of a prosecutor and trial court, or an enforcement official and agency judge, is to apply these rules; and

)the limited role of a constitutional reviewing court is to determine whether these legal institutions have, yet, done enough epistemic work to impose a sanction upon X. n205 The reviewing court's role is not to engage in a boundless search for something, sometime, that X did wrong, and so the truth of retributivism is no obstacle at all to a rule-targeted, epistemic right.

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n205. Cf. Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973) (articulating view of constitutional courts as institutions with a limited role). Some view of this sort is surely right. See, e.g., Owen M. Fiss, The Supreme Court, 1978 Term - Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 5-17 (1979) (denying that federal courts are limited to resolving disputes, but arguing that their role is limited to the protection of "constitutional values").

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Despite its plausibility, the idea of epistemic<1> rights must be rejected. The problem is that, in general, there is no justiciable constitutional norm against proscribing actions that are morally innocent, or against sanctioning persons who merely breach rules that proscribe morally innocent actions. n206 The Constitution, as enforced by the courts, does not generally prohibit the imposition of a civil or criminal sanction upon a morally innocent actor: some Y whose action, which a legal rule prohibited, was morally permissible [*59] or required. n207 State officials do not violate Y's constitutional rights under the Eighth Amendment, the Due Process Clause, or any part of the Constitution by sanctioning him for breaching a rule that prohibits "the sale of filled milk," even if filled milk is a perfectly healthy product that was banned by mistake or because the legislature was controlled by the manufacturers of substitute products. n208 They do not violate W's constitutional rights by sanctioning her for breaching a rule that prohibits opticians from "dispensing eyeglasses without an opthamologist's prescription," even if most opticians, including W herself, are perfectly competent to write eyeglass prescriptions. n209

Relatedly, then, the Constitution does not generally provide epistemic<1> rights to sanctioned persons. Z can be sanctioned, without further epistemic work, pursuant to a rule prohibiting "the sale of filled milk" or "dispensing eyeglasses without an opthamologist's prescription" - regardless of whether some [*60] or many actions within the scope of these rules are morally innocent. n210

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n206. See Larry Alexander, The Supreme Court, Dr. Jekyll, and the Due Process of Proof, 1996 Sup. Ct. Rev. 191, 216 & n.76 (discussing absence of federal constitutional restrictions on states' definitions of crimes); Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269 (1998) (same).

n207. Nor does it do to say that actors have a general moral obligation to obey the law, such that Y's action may have been morally innocent prior to its legal proscription, but breaching that proscription was itself morally wrong. See Schauer, supra note 58, at 125 (noting possibility of moral obligation to obey the law). This argument, cogent or not, is hardly one that the defender of epistemic<1> rights can advance; rather, she must claim that some of the actions that legal rules proscribe are morally innocent, and that actors retain epistemic rights with respect to those actions even after breaching the legal rules. If so, she must explain why the actors in Flag Desecration and the other stylized cases, but not other actors, have such rights.

n208. See United States v. Carolene Prods., 304 U.S. 144 (1938) (upholding, over substantive due process challenge, indictment of filled milk manufacturer pursuant to statute prohibiting interstate shipment of filled milk); Geoffrey P. Miller, The True Story of Carolene Products, 1987 Sup. Ct. Rev. 397 (detailing absence of moral reason to ban filled milk, and special-interest politics behind passage of statute). Although the Carolene Products opinion itself leaves open the possibility of some judicial scrutiny for those "garden variety" statutes that do not trigger heightened scrutiny, see 304 U.S. at 152-54, it is now notoriously true that the effective level of judicial scrutiny for such statutes is zero. See, e.g., Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding, over substantive due process and equal protection challenge, statute prohibiting nonlawyers from engaging in business of debt adjusting, and detailing judicial deference absent more specific constitutional challenge). The upshot, as Professor LaFave notes, is that "the United States Supreme Court has all but abandoned the practice of invalidating criminal statutes on the basis that they bear no substantial relation to injury to the public." 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law 2.12(b), at 211-12 (1986).

Although the Court in Robinson v. California, 370 U.S. 660 (1962), did strike down a statute criminalizing mere "status" (viz., drug addiction), as violating the Eighth Amendment, it has since been careful to cabin Robinson narrowly. See Powell v. Texas, 392 U.S. 514, 533 (1967) (plurality opinion) ("Robinson ... brings this Court but a very small way into the substantive criminal law. And unless Robinson is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming ... the ultimate arbiter of the standards of criminal responsibility ....").

n209. See Williamson v. Lee Optical, 348 U.S. 483 (1955) (upholding, over substantive due process challenge, statute prohibiting opticians from

dispensing eyeglasses without prescription from licensed optometrist or ophthalmologist).

n210. Creating a general epistemic<1> right - a general right not to be sanctioned pursuant to a rule where, relative to the act-description set forth in the rule plus whatever further facts about the claimant's action have properly come to the court's attention, the claimant is possibly or likely morally innocent - would involve a return to the broad-ranging practice of judicial review characteristic of the Lochner period, see Lochner v. New York, 198 U.S. 45 (1905). What if the defender of the Direct Account wants to do just that? Then he can plausibly argue that the claimants in Child Pornography, Flag Desecration, and Abortion have had their epistemic<1> rights violated; but I would then reply, as to the notion of epistemic<2> rights, that this is dilutive. See infra text accompanying notes 220-25.

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The defender of the Direct Account might be tempted to distinguish Flag Desecration, Child Pornography, and Abortion from the case in which Z is sanctioned for "the sale of filled milk," or "dispensing eyeglasses without an opthamologist's prescription," by appealing to the concept of liberty: "The particular action X performed, in our stylized cases, was an action falling within some class of constitutional liberties. X's particular action was an action of speech in Flag Desecration and Child Pornography, and an action lying within the zone of privacy in Abortion. This is not true of Z: Z's particular action was not a liberty-type action. Therefore X, but not Z, is entitled to more epistemic work sufficient to determine whether his action was wrong." But this attempt to salvage the idea of epistemic<1> rights is misconceived, because it distorts the concept of liberty.

The concept of liberty, or freedom, is forward-looking, not backward-looking. To say that actors should be at liberty to perform actions of type A - expressive actions, or actions falling within the zone of personal privacy - is to say that performing an A-type action, or not, should be at the actor's choice (absent overriding reason). Actors should not be coerced (absent overriding reason) into refraining from A-type actions, or otherwise prevented from choosing, themselves, whether or not to perform actions of that type. n211 But it is only physically possible for actors to choose [*61] the actions that they will perform in the future; it is physically impossible for actors to change the actions they already did or did not perform, in the past. n212 Therefore, any moral imperative to leave actors free to perform A-type actions must be a forward-looking imperative. For example, the freedom of speech at Time T<0> means that actors who might speak at future times T<1>, T<2> ... ought not be coerced by the duty-imposing legal rules that are or will be in force, into remaining silent at those future times. It does not mean that an actor who already has spoken, at some prior times T[in'-1'], or T[in'-2'], ... is entitled to extra, epistemic work - beyond what is ordinarily required under the Eighth Amendment or the rest of the Constitution - to determine whether her past speech-act was wrongful under another description. n213

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n211. Consider Joel Feinberg's definition of "liberty," at the beginning of his famous treatise on the criminal law, where he quite naturally ties the idea of "liberty" to choice and coercion:

We can ... formulate the basic question of these volumes as one about the moral limits of individual liberty, understanding "liberty" simply as the absence of legal coercion. When the state creates a legal statute prohibiting its citizens from doing X on pain of punishment, then the citizens are no longer "at liberty" to do X. The credible threat of punishment working directly on the citizens' motives makes X substantially less eligible than before for their deliberate doing.... When we are prohibited from doing [X] we are required, under threat of penalty, to omit doing [X].

Feinberg, supra note 57, at 7. One might dispute Feinberg's definitional link of liberty and coercion. "There are many other barriers to our actions than prohibitory rules backed by threats of punishment...". But it would be false and misleading to say that I am not free or not at liberty to do [such] things." Id. at 8. Whether or not Feinberg is right, here, it is at least clear that legal coercion exemplifies a restriction on liberty because legal coercion (and brute state force) is the exemplary way to restrict actors' future choices.

As for the Feinbergian link between liberty and choice: I believe that this is the correct analysis of the concept of liberty, but ultimately this conceptual claim is less important than the point that the choice-based concept Feinberg delineates - and not its backward-looking analogue - better captures the constitutional criteria of free speech and substantive due process.

n212. I assert this to be true as a matter of common sense. How to cash out this truism, in a theory of free will and the nature of the physical world, is well beyond my ken. See, e.g., Storrs McCall, A Model of the Universe: Space-Time, Probability, and Decision 1-19, 250-79 (1994) (defending branching model of universe, with open future and closed past, and explicating free will within this model).

n213. This raises the question why, on any account of the Free Speech Clause and the substantive component of the Due Process Clause, retrospective challenges to sanctions rather than prospective challenges to duties should be allowed. I deal with that question below. See infra text accompanying notes 409-13.

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Now, it is certainly open to the defender of the Direct Account to submit a creative reinterpretation of the Free Speech Clause and the substantive component of the Due Process Clause. He might argue, creatively, that these clauses do not protect "liberties" in my forward-looking sense; rather, they protect "liberties*" in the special, backward-looking sense appropriate to the idea of epistemic<1> rights. A liberty* is an epistemic trigger. A liberty* marks out some class of actions such that, if X performed an action within that class, and is sanctioned pursuant to an underdescriptive rule, X is specially entitled to the performance of additional epistemic work sufficient to determine whether his sanction is justified. But the standard, and better, moral readings of the Free Speech Clause and the substantive component of the Due Process Clause see these provisions as protecting liberties, not liberties*. It is vitally important to actors, and to their listeners, that they be free to

perform certain expressive actions; it is vitally important to them that they have the free choice whether or not to perform actions lying within [*62] the zone of privacy. n214 This is a forward-looking, not a backward- looking, reading of the moral criteria lying behind Flag Desecration, Child Pornography, and Abortion. As between the standard view that the Free Speech Clause and the substantive component of the Due Process Clause of the Constitution protect liberties, and the creative view that they protect liberties*, the standard view is much better. n215

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n214. See infra notes 317, 327-28, 343 and accompanying text (discussing standard, liberty- protecting view of free speech and substantive due process, and citing sources).

n215. The standard view might be wrong. See infra text accompanying notes 354-57 (discussing discrimination, rather than liberty, account of free speech and substantive due process). But the plausible alternative to the standard view is that these clauses protect liberties in no sense - not that they protect liberties*.

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An additional problem with the notion of epistemic<1> rights, and the associated concept of liberties* (epistemic triggers), is that these ideas do little to explain the remaining stylized cases: Residential Picketing, Animal Sacrifice, and Alcohol. If there is an epistemic failure that occurs in these remaining cases, it does not seem to be the failure of underdescription. A rule prohibiting the "picketing of residences, except by labor groups" is not significantly underdescriptive: most actions of residence-picketing are unnecessarily disruptive and upsetting to the residents, and ought not be performed. n216 Similarly, a rule prohibiting "the sacrifice of animals for religious purposes" may not be significantly underdescriptive, depending on how one balances the religious needs of the actors against the animals' welfare. Thus, even if the First Amendment does underwrite liberties* rather than liberties, it is hard to see how the idea of epistemic<1> rights explains Residential Picketing and Animal Sacrifice. As for Alcohol: X's purchase of alcohol was not an exercise of a liberty or a liberty*, because the Equal Protection Clause does not protect "liberties" in either sense. n217 So an appeal to liberties* will not explain why epistemic rights are violated in that case, as opposed to the case of a Z [*63] sanctioned for "the sale of filled milk" or "dispensing eyeglasses without an opthamologist's prescription."

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n216. See Frisby v. Schultz, 487 U.S. 474 (1988) (upholding general ban on residential picketing, over free speech challenge). Another, more conventional way of putting the distinction between Residential Picketing and Flag Desecration is to say that the first is underinclusive and the second overinclusive. See, e.g., Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 Sup. Ct. Rev. 29, 29-32 (articulating puzzle of underinclusion, within free speech jurisprudence). Underinclusion precludes underdescription, in the sense demanded by epistemic<1> rights. Whatever the correct account of Residential Picketing, or of the majority decision in

R.A.V., it cannot be that the sanctions in these cases were meted out pursuant to rules that were underdescriptive.

n217. No plausible theory of the Equal Protection Clause sees it as delineating liberties in either sense. See infra section II.B (discussing leading theories of equal protection).

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Given these difficulties with the notion of epistemic<1> rights, the defender of the Direct Account might be tempted to rework the epistemic idea along the following lines:

Epistemic<2> Rights: Rules That Are Enacted Through an Unreliable Process

To say that X's sanction pursuant to rule R is "unconstitutional," or that it violates her "constitutional rights," is to say that X has a legal right to have more epistemic work performed (specifically, by trying her under a different rule), prior to imposing a sanction upon her. More epistemic work is needed because the process by which R was formulated was defective in certain, constitutional ways. The legislators or administrators who formulated R were not sufficiently informed, impartial, and deliberative to determine, in a reliable way, which actions should be legally proscribed and subject to sanctions. Specifically, certain errors (false beliefs) about the moral relevance of speech, religion, race, or gender infected the process by which R was formulated.

Note a few attractive features of this new formulation of the epistemic idea. First, the idea of epistemic<2> rights potentially explains Residential Picketing, Animal Sacrifice, and Alcohol as well as (perhaps) Flag Desecration, Child Pornography, and Abortion. The rule in each case can, arguably, be taken as evidence of some process defect. For example, the rules in Residential Picketing and Animal Sacrifice are not underdescriptive in the sense required by epistemic<1> rights, but we can plausibly say that they evidence a rule-formulation process infected with false beliefs about the moral relevance of speech and religion. An action of residential picketing is not made less harmful by the labor-related viewpoint of the picketers; an action of killing animals is not made more harmful by the religious cast of the actors. So we can infer that the legislators or administrators who formulated these rules made certain moral errors (within a class of errors delineated by the First Amendment); and we can therefore conclude that X's epistemic<2> rights have been violated. The Constitution demands, we might say, that persons not be sanctioned pursuant to rules whose formulation was infected by certain error-types: at least that much epistemic work is morally and constitutionally required, prior to imposing a sanction.

[*64] Relatedly, the idea of epistemic<2> rights does not require an appeal to the notion of liberties* (epistemic triggers) in order to explain why epistemic rights are violated in our stylized cases but not in the case of a rule prohibiting "the sale of filled milk" or "dispensing eyeglasses without an opthamologist's prescription." The process for formulating a rule can be constitutionally defective, independent of whether the rule includes liberties* within its scope, and independent of whether X's particular action was an instance of a liberty*. All we need is some constitutional basis for delineating a class of error-types - types of false beliefs, such that, if these beliefs

infected the rule-formulation process, more epistemic work is morally and constitutionally required. The First Amendment, inter alia, proscribes legislative error about the moral relevance of speech n218 and religion; the Equal Protection Clause proscribes legislative error about the moral relevance of race and gender. n219 Thus, the idea of epistemic<2> rights can be used to explain Alcohol (which does not involve liberties or liberties*) as well as the remaining stylized cases. The promulgation of a rule prohibiting men between eighteen and twenty-one (or women or black persons) from purchasing alcohol evidences false beliefs, among legislators, about the moral relevance of gender (or race), and it therefore violates X's epistemic<2> rights to be sanctioned pursuant to this rule quite independent of the presence of liberties or liberties*.

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n218. See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 227-33 (1983) (arguing that free speech doctrine operates, in part, to identify laws where legislators were improperly motivated with respect to speech).

n219. See Andrew Koppelman, Antidiscrimination Law and Social Equality 13-56 (1996) (analyzing process theories of equal protection).

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But does this epistemic tack really work? Does the idea of epistemic<2> rights successfully underwrite the Direct Account? I think not. The difficulty with the idea of epistemic<2> rights is that it dilutes the moral justification for judicial review. The moral fact about Flag Desecration, Child Pornography, Abortion, and the remainder of our stylized cases is not merely the epistemic fact that society needs to undertake further moral deliberation and research. It is not merely that more epistemic work needs to be done to determine whether sanctioning a given individual under the stylized rule is morally justified. Rather, and more strongly, the moral fact about each and every one of the stylized rules is the nonepistemic fact that the rule-predicate should be repealed or amended. As I will argue at much greater length in Part III, for each stylized rule there is sufficient moral reason that the rule-predicate be changed, [*65] in some measure. The rule in Flag Desecration wrongly coerces otherwise-innocent speakers to refrain from expressing their views about the flag; the rule in Abortion wrongly coerces some women not to procure abortions; the rule in Child Pornography wrongly coerces parents not to display pictures of their naked infants; the rules in Alcohol, Animal Sacrifice, and Residential Picketing wrongly discriminate on the basis of race, gender, religion, or viewpoint. A world with these rules is a world that, in some measure, is morally awry - not merely a world whose moral status demands more inquiry on our part. n220

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n220. See infra sections III.A.1-2.

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The difference between epistemic and nonepistemic grounds for judicial intervention is a large one; it parallels the large differences that moral

philosophers and jurisprudes have elaborated in other contexts, for example, between reason for belief and reason for action, n221 between attempted and completed crime, n222 and between risking and wronging. n223 By advancing merely an epistemic claim, the idea of epistemic<2> rights makes a weaker case for constitutional review, under the Bill of Rights, than can and should be made. Although this critique is not catastrophic for the epistemic idea - it does not prove the idea to be internally incoherent, or deeply confused - it does weigh against epistemic<2> rights and in favor of the Derivative Account.

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n221. See Hurd, supra note 169, at 1615-20.

n222. See Hurd, supra note 184, at 187-93 (criticizing attempted-act deontology).

n223. See Stephen R. Perry, Risk, Harm, and Responsibility, in Philosophical Foundations of Tort Law 321 (David G. Owen ed., 1995).

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The defender of the Direct Account might respond to this point by saying that constitutional reviewing courts are not competent to determine whether morality requires a change in the predicates of rules. Their role is merely epistemic, not nonepistemic - to protect epistemic<2> rights, and nothing more. But if that were true, constitutional law would look radically different. Constitutional courts pervasively scrutinize rule-predicates and not merely the direct historical evidence (in the legislative or administrative history, or in a rulemaking record, or in the testimony of legislators or administrator) of the beliefs that motivated rule-formulators. n224 Judicial re [*66] view, under the First Amendment, the Equal Protection Clause, and the substantive component of the Due Process Clause, is largely structured around moral "tests" governing the predicates of rules: the state must justify its rule-predicate as "narrowly tailored to a compelling governmental interest," or as "significantly related to an important governmental interest," or as non-discriminatory, or whatever. n225 To interpret these as tests for false beliefs that may have figured in a rule's enactment, which courts apply so as to protect epistemic<2> rights, is to get matters quite backwards. A rule- predicate evidences the role of false beliefs in the rule's enactment only if moral reason obtains to change, in some measure, the rule- predicate. For if the predicate is morally perfect, where is the evidence? In short, if courts are competent to perform this "evidentiary" testing of rule-predicates, then mutatis mutandis they are competent to perform the task required by the Derivative Account, and the epistemic<2> idea is unduly dilutive.

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n224. This is not to say that direct historical evidence is irrelevant to reviewing courts. See Hunter v. Underwood, 471 U.S. 222, 228-29 (1985) (relying on direct historical evidence of racist motivation behind facially neutral provision of state constitution to invalidate provision). Nor is it to say that a system exclusively focused on the rulemaking record, cf. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 250-53 (2d Cir. 1977) (invalidating rule under Administrative Procedure Act, given agency's failure to respond adequately to public comments), or even on testimony by officials about their mental

states, cf. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (remanding, under Administrative Procedure Act, for possible testimony by administrator), is a conceptual impossibility. But clearly constitutional review, as now and long practiced, is not exclusively focused on direct historical evidence of the beliefs behind rules.

n225. See supra notes 40-43 and accompanying text.

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B. Equality

I have extensively discussed, and criticized, two possible defenses of the Direct Account: a nonepistemic theory of justified sanctions, such as an expressive or deterrent theory, that counts a rule's predicate or history as part of the morally necessary conditions for a justified sanction, independent of the epistemic capacities of reviewing courts; and an epistemic theory of justified sanctions, that counts a rule's predicate or history as indicating the need for additional moral inquiry prior to imposing a sanction.

But these are not the only defenses available to the Direct Account. Equality is a partly separate, and morally rich, idea within constitutional theory. The defender of the Direct Account might hope to explain some, or even most types of constitutional rights, by employing a theory of equality. At a minimum, she should hope thus to explain the constitutional rights that arise in classic equal protection cases, here exemplified by the stylized case I call Alcohol. And, by extension, she might think that equality can underwrite the Direct Account for cases of "discrimination" that arise, not under the Equal Protection Clause, but under the Free Speech Clause (as in Residential Picketing, or perhaps Flag Desecr [*67] ation and Child Pornography), n226 or the Free Exercise Clause (as in Animal Sacrifice), n227 or even the Substantive Due Process Clause.

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n226. See Police Dept. v. Mosley, 408 U.S. 92 (1972) (invalidating rule prohibiting picketing near school, except peaceful labor picketing, under Equal Protection and Free Speech Clauses); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615, 622-24 (1991) (noting increasingly important idea of "content discrimination" within free speech doctrine).

n227. See supra text accompanying notes 109-13 (discussing isomorphism between current free exercise doctrine and equal protection doctrine).

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Let us focus on Alcohol, for I will argue that a theory of equality does not underwrite the Direct Account in this classic equal protection scenario - and thus, a fortiori, that it does not explain free speech, free exercise, or other such cases that may have something to do with equality. My discussion cannot be comprehensive, for there are in fact many different theories of equality. Equality is an especially tricky and multifaceted moral concept. n228 Rather, I will focus on those theories of equality that have figured most prominently in constitutional law and constitutional scholarship: (1) equality as the equal

treatment of "similarly situated" persons; (2) equality as the freedom from moral stigma or insult; (3) equality as the guarantee of a political process that is free of prejudice against certain groups; and (4) equality as a guarantee against laws that aggravate the subordinate position of a specially disadvantaged group.

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n228. For recent philosophical treatments, see Larry S. Temkin, Inequality (1993); Dennis McKerlie, Equality, 106 Ethics 274 (1996). For an overview of the theories that have figured most importantly within the literature on the Equal Protection Clause, particularly with respect to race and gender, see Koppelman, supra note 219, at 13-114.

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1. Similarly Situated Individuals

Joseph Tussman and Jacobus tenBroek are justly famous for their 1949 article on the "Equal Protection of the Laws," which clarified and made influential the idea that equal protection requires the equal treatment of "similarly situated" persons.

The essence of [the Equal Protection Clause] can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated. n229

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n229. Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 3 Cal. L. Rev. 341, 344 (1949) (footnote omitted); see Fiss, supra note 108, at 110 & n.2 (describing Tussman and tenBroek's "now classic article").

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The Supreme Court regularly articulates this theory of equality in its equal protection jurisprudence, n230 and Kenneth Simons has carried forward and refined the idea within constitutional scholarship. n231

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n230. See, e.g., Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997) ("[The Equal Protection Clause] embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly."); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause ... is essentially a direction that all persons similarly situated should be treated alike.").

n231. See Kenneth W. Simons, Overinclusion and Underinclusion: A New Model, 36 UCLA L. Rev. 448, 456-60 (1989) [hereinafter Simons, Overinclusion and Underinclusion] (discussing Tussman and tenBroek's model of classificatory fit); id. at 463-518 (proposing new variant); see also Kenneth W. Simons, Equality as a Comparative Right, 65 B.U. L. Rev. 387, 389 (1985) (stating that equality rights are not empty, understood as comparative rights: "A right to equal treatment is a comparative claim to receive a particular treatment just because another person or class receives it").

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Let us bracket the point that the Court does not, in fact, enforce a general guarantee of equal treatment for "similarly situated" individuals. It is notoriously true that the Court will uphold wildly arbitrary and unfair laws - laws that fail to accord equal treatment to similarly situated firms, or workers, or consumers - as long as the laws do not employ "suspect" predicates such as race and gender, and other special factors are not present. n232 Even leaving this point aside, the "similarly situated" theory of equality does not help show why the Direct Account holds true.

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n232. See FCC v. Beach Communications, Inc., 508 U.S. 307, 313-17 (1993) (discussing deference to social and economic regulation under Equal Protection Clause, and citing cases). "Special factors" is meant to cover the unusual cases in which the Supreme Court invalidates statutes under the rational-basis prong of equal protection scrutiny. See supra note 99.

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Consider the following variant of Alcohol: A rule prohibits the purchase of alcohol by women (but not men) between the ages of eighteen and twenty-one. For purposes of this discussion, I will assume that the rule is irrational: its purpose is to prevent drunk driving, and while all persons between eighteen and twenty-one are more prone to drive drunk than all persons twenty-one or over, women and men between eighteen and twenty-one are equally prone to drive drunk. A woman W is sanctioned for breaching the rule, and challenges her sanction on equal protection grounds. It turns out that W's action of purchasing alcohol also was an action of criminal fraud; she used a stolen credit card to execute the purchase. Is there sufficient moral reason for the court to overturn W's sanction, without further invalidating the no-alcohol rule?

The defender of the Direct Account wants to say that W has been treated unequally, relative to a class of similarly situated men. The puzzle lies in defining the class of men to whose treatment W's [*69] should be compared. n233 Is it (1) men who are similar to W in all moral respects, that is, men between eighteen and twenty-one who have purchased alcohol using stolen credit cards; or rather (2) men who are similar to W with respect to the purpose of the rule, that is, men between eighteen and twenty-one who have purchased alcohol? Relative to comparison class (2), W has indeed received unequal treatment: she has been sanctioned, while men between eighteen and twenty-one who purchase alcohol will not generally be sanctioned for doing so. But, relative to comparison class (1), W has not received unequal treatment: she has been sanctioned pursuant to the no-alcohol rule, while men between eighteen and twenty-one who purchase alcohol using stolen credit cards will presumably be

sanctioned pursuant to the laws against fraud. n234

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n233. Cf. Simons, Overinclusion and Underinclusion, supra note 231, at 465 (noting that "an equal protection claim necessarily compares the treatment of an identifiable plaintiff's class with the more favorable treatment of some other identifiable class"). I would modify this, to say that the plaintiff compares her treatment with the treatment of some identifiable class. If the plaintiff is bringing a facial, anticipatory challenge to a statute, then her (known) relevant features are the features picked out by the statutory classification; if, however, she is bringing a different kind of challenge, more features of her may be known, which may place her within a different moral class, and we should not assume that her claim of comparative equality stands or falls depending upon the way others within her statutory class fare.

n234. Of course, if W were sanctioned seriatim for purchasing alcohol and then for fraud, her multiple punishment would be unequal treatment whatever the comparison class; but I have assumed that our stylized actors are sanctioned only pursuant to the invalid rule. See supra text accompanying notes 163-64.

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In short, the problem of multiple description, which bedeviled the Direct Account earlier on - within a theory of justified sanctions - reappears within a theory of equality. For the retributivist, as we have seen, it is a matter of (nonepistemic) moral indifference whether the battering flag-desecrator is sanctioned pursuant to a law that prohibits "battery" or pursuant to a law that prohibits "flag desecration." It is a matter of moral indifference for the retributivist whether the fraudulent alcohol-purchaser is sanctioned pursuant to a law that prohibits "fraud" or a law that prohibits "alcohol purchases by women between eighteen and twenty-one." The defender of the Direct Account might hope that, by shifting ground from the pros and cons of retributivism to the terrain of equality, he can avoid the problem of multiple description. But he cannot. For the problem simply recurs, here, in a slightly different form. Now, the problem is whether the description under which some person is sanctioned shapes the comparison class of "similarly situated" persons, for purposes of deciding whether the sanctioned person has received equal treatment compared to that class.

[*70] Only a description-dependent method for defining comparison classes can underwrite the Direct Account. Therefore, the defender of the Direct Account will want to adopt the view that the class of men similarly situated to W is (2) the class of men between eighteen and twenty-one who purchased alcohol. The purpose of the no- alcohol rule is to prevent the risk of drunk driving, a risk to which both male and female drinkers between eighteen and twenty-one are particularly prone. The purpose of the no-alcohol rule is not to prevent fraud, and so non-fraudulent as well as fraudulent male purchasers are relevantly similar to W. Or so the defender of the Direct Account will argue. n235 But the difficulty with this view is that - if we were to sanction W, for the very same action of hers, under a different rule - the comparison class would change. Imagine that nothing in the world changes, except for the state's choice of rule. W has performed her action of fraudulent alcohol- purchase, as before; men between eighteen and twenty-one who perform otherwise-innocent actions of alcohol-purchase are not sanctioned, as before; and men between eighteen and

twenty-one who perform fraudulent actions of alcohol-purchase are sanctioned, as before, pursuant to the laws against fraud. Now, however, the state prosecutes W for fraud rather than for breaching the no- alcohol rule. On the description-dependent view, W no longer has an equality complaint, for the correct comparison class is now (3) men who have committed fraud, that is, those similarly situated with respect to the anti-fraud purpose of the law pursuant to which W is sanctioned. But why should the state's choice of law have this kind of bedrock moral significance, in changing whether W herself has received what equality demands? Nothing in W's own resources, opportunities, and welfare has changed - unless we are willing to make further claims about the "expressive" or "stigmatic" import of rule-descriptions - and nothing has changed in the resources, opportunities, or welfare available to men.

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n235. Cf. Tussman & tenBroek, supra note 229, at 346 ("Where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law."). But Tussman and tenBroek are concerned here with whether the enactment of a classification into law satisfies equal protection, and not whether a particular application of that law does. See id. at 344-45 (explicitly stating that their concern is enactment, not application).

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The exponent of the Derivative Account has a simple and elegant answer to this puzzle. Whatever the right method for defining comparison classes, the no-alcohol rule should be generally invalidated in some way - either repealed, or extended to include men [*71] between eighteen and twenty-one as well as women. For, whatever the right method, enforcing the no-alcohol rule as is will lead to violations of equal treatment. If the right method is description-dependent, then the rule should be repealed or amended: all women sanctioned pursuant to the rule - both otherwise-innocent women who do nothing more than purchase alcohol, and women who commit fraud, etc. - are treated unequally, relative to all or at least some men between eighteen and twenty-one who purchase alcohol. Conversely, if the right method is description-independent, then the rule should still be repealed or amended: otherwise-innocent women sanctioned pursuant to the rule are treated unequally, relative to those otherwise-innocent men between eighteen and twenty-one who purchase alcohol and will not be sanctioned under any laws. To put the point succinctly and generally: if a legislative classification, such as the classification in the no-alcohol rule, is indeed irrational relative to valid legislative purposes, then - regardless of the significance of the rule's purpose in defining comparison classes - the proponent of a Tussman/tenBroek type theory of equality will want to repeal or amend the rule.

I tend to believe that the proper method for defining comparison classes is description-independent. To think otherwise is to conflate a nonexpressive theory of equality, specifically a theory that demands the similar treatment of morally similar persons, with an expressive theory of equality that focuses on the problem of stigma and insult. But, in any event, the defender of the Derivative Account can remain agnostic on this issue. The defender of the Direct Account cannot; she must either establish a puzzling and controversial theory of description-dependent comparison classes, or else move on to a different

theory of equality altogether.

2. Stigma

A second theory of equality, prominent within constitutional scholarship n236 as well as the case law, n237 focuses upon unfair stigma [*72] - paradigmatically, racial stigma - as a serious form of wrong and unequal treatment. Paul Brest produced the classic scholarly exposition of this theory in his 1977 article entitled In Defense of the Antidiscrimination Principle. n238

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n236. See Koppelman, supra note 219, at 57-76 (surveying stigma theory within scholarship on discrimination).

n237. See Brown v. Board of Educ., 347 U.S. 483, 494 (1954) ("To separate [schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). The Court, since Brown, has repeatedly invoked the notion of stigma in its race-discrimination case law - most recently, in seeking to justify strict scrutiny for affirmative action. See, e.g., Adarand v. Pena, 515 U.S. 200, 229 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). For earlier invocations, in the context of straight race discrimination, see, e.g., Freeman v. Pitts, 503 U.S. 467, 485 (1992); Crawford v. Board of Education, 458 U.S. 527, 544 (1982); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26 (1971).

n238. Paul Brest, The Supreme Court, 1975 Term - Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976).

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[One] rationale for the antidiscrimination principle is the prevention of the harms which may result from race-dependent decisions.... Decisions based on assumptions of intrinsic worth and selective indifference [inter alia] inflict psychological injury by stigmatizing their victims as inferior. n239

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n239. Id. at 8.

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The theory goes back to the Court's decision in Brown v. Board of Education, n240 and before that to Justice Harlan's dissent in Plessy v. Ferguson, in which Harlan indicted segregation as placing a "badge of servitude" upon blacks.

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n240. 347 U.S. at 493-94.

n241. See Plessy v. Ferguson, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting).

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The theory helps explain why rules that employ "suspect" predicates, such as racial predicates, are uniquely subject to judicial invalidation under the Equal Protection Clause. It is intuitively plausible to think that where (1) the predicate of rule R picks out actors by virtue of their race (black) and (2) is morally suboptimal in scope (morality requires either an extension of the rule to include whites, or a repeal), which strongly evidences (3) the causal role of legislators' or constituents' false beliefs about the moral inferiority of black persons, in producing the rule, the upshot is that (4) a serious kind of wrong (a "stigma") is done to black persons who are sanctioned pursuant to the rule. n242

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n242. It is possible that stigma ensues even where the rule's predicate is morally optimal in scope. But we then have an evidentiary question about the existence of prejudice in producing the rule - although that, too, may not be a necessary condition for stigma. In any event, the strongest case for stigma is where all of the first three conditions obtain.

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Note, too, how a stigma theory of equality helps the defender of the Direct Account. Consider a variant of Alcohol with a racially discriminatory rule that prohibits the sale of alcohol to black persons between eighteen and twenty-one. A black person B is sanctioned for breaching the rule, and challenges his sanction on equal protection grounds. It turns out that B used a stolen credit card to purchase the alcohol. The defender of the Direct Account has here a straightforward and morally compelling explanation why it is not, all things considered, a matter of moral indifference whether B is [*73] sanctioned pursuant to a racially neutral anti-fraud rule, as opposed to the no-alcohol rule. B deserves, or may deserve, that sanction, under our general theory of sanctions; retributivism is, or may be, true. Thus, it is, or may be, a matter of indifference, for purposes of our theory of sanctions, whether B is sanctioned pursuant to the no- alcohol rule or an anti-fraud rule. But the choice of rule is not, all things considered, a matter of moral indifference, because to sanction B as a "black" (regardless of her fraud) is to do her serious wrong. When we add our theory of equality to our theory of sanctions, even the retributivist can agree that there is sufficient and compelling moral reason for a court to invalidate B's sanction - and quite independent of further invalidating the no-alcohol rule.

Thus, the Direct Account has finally gained a secure foothold within constitutional law. By using a stigma theory of equality, the defender of the Direct Account can finally explain, in a plausible and persuasive way, a

central part of our constitutional jurisprudence - the jurisprudence of race discrimination. But how widely can she extend the stigma theory, beyond that central part? Let us continue cycling through the variants of Alcohol. The defender of the Direct Account might plausibly extend Brest's theory to the case where a rule prohibits women between eighteen and twenty- one from purchasing alcohol, and a woman W who has breached the rule is sanctioned for doing so. n243 But what about the case in which a man M is sanctioned pursuant to a rule prohibiting alcohol sales to men? I take this variant directly from the Court's decision in Craig v. Boren n244 - remember that the Oklahoma statute invalidated in Craig prohibited the sale of low-alcohol beer to men between eighteen and twenty-one n245 - and that feature of Craig is hardly unusual for the Supreme Court case law on gender discrimination. As one scholar has noted: "It has become notorious that in almost all the major sex discrimination cases decided by the Supreme Court, the prevailing plaintiff was a man." n246

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n243. See Koppelman, supra note 219, at 118-27 (arguing that women are stigmatized by gender-discriminatory laws).

n244. 429 U.S. 190 (1976).

n245. See Craig, 429 U.S. at 191-92.

n246. Koppelman, supra note 219, at 133.

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So explaining the M variant of Alcohol is a serious problem for the defender of Direct Account - and it cannot be resolved, I suggest, using the stigma theory. The enactment of a rule prohibiting the sale of alcohol to men is not plausibly taken as evidence of the causal role that false beliefs about the moral inferiority of men [*74] played in the enactment of that rule. Just the opposite: at most it is plausibly taken (if morally suboptimal), just like the enactment of the W variant, as evidence of the causal role that false beliefs about the moral inferiority of women played in the enactment of the rule. Andrew Koppelman, a leading advocate of the extension of the stigma theory from race to gender, argues thus in his discussion of Michael M. v. Superior Court n247 - a case where the law, as in Craig, provided more stringent treatment for men than women.

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n247. 450 U.S. 464 (1981).

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[This case] involved a constitutional challenge to California's statutory rape law, which criminalized sexual intercourse with a female (but not with a male) under the age of eighteen.... The law's likely effect was "legitimating stereotypes of male aggressiveness and female vulnerability, as well as double standards of morality that traditionally have served to repress women's sexual expression." n248

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n248. Koppelman, supra note 219, at 144-45 (quoting Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law 102 (1989)). Even if a rule can be stigmatic independent of prejudice in the rule's history, see supra note 242, it is implausible that a rule discriminating against men (in our society, today) signals their inferiority.

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Perhaps the stigma theory furnishes reason to invalidate the no- alcohol-for-men rule - but what this theory warrants is the invalidation of the rule, not merely M's own treatment. n249 Sanctioning M pursuant to the no-alcohol-for-men rule does not stigmatize him, in the way that sanctioning W pursuant to the no-alcohol-for-women rule stigmatizes her, and sanctioning B pursuant to the no-alcohol- for-blacks rule stigmatizes B.

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n249. See infra text accompanying note 276 (discussing problem of marginal contribution).

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So I take the stigma theory to have gained the Direct Account a secure, but only a small foothold within constitutional law. A stigma-based Direct Account explains only a portion of current equal protection law: the B and W variants of Alcohol. It does not explain the M variant of Alcohol, and it explains none of our remaining stylized cases, with the possible exception of Abortion. "Moral inferiority" is an essential part of the stigma theory; it is what makes the theory powerful and persuasive. n250 What constitutes a moral insult to X, sufficient to justify overturning her sanction even if the rule R is not further invalidated, and even if X herself has performed wrong, is the belief of the legislators who enacted R (or their ascription of such a belief to their constituents) that X is a moral inferior. No rule in our remaining stylized cases, with the possible exception of Abortion, evidences such a belief about the sanctioned Xs.

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n250. See, e.g., Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (condemning race discrimination because it stigmatizes blacks as inferior); Brest, supra note 238, at 8-12 (same).

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3. Process Theories

Our alcohol-drinking M may still have hope. A theory of equality that demands the equal treatment of "similarly situated" persons fails to explain why the

Direct Account holds true for M, W, or B in Alcohol; a theory of equality that demands freedom from unfair stigma works for W and B, but not M; yet there remains the possibility that a "process" theory of equality can help M. n251 That kind of theory has its origin in the oft-quoted footnote four of Carolene Products, n252 and has been given its most salient scholarly exposition by John Hart Ely in his book Democracy and Distrust. n253 As Ely explains:

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n251. See Koppelman, supra note 219, at 13-56 (surveying process theories within scholarship on discrimination).

n252. See United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire [here] ... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

n253. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

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In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the process is undeserving of truth, when ... though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system. n254

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n254. Id. at 103.

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As the passage suggests, a process theory trades essentially on the political role of prejudice (which I would construe as false beliefs about the moral inferiority of the targeted group, and perhaps related types of false beliefs, for example, certain stereotypes). One can develop the theory in two different ways: (1) by arguing that it is intrinsically or instrumentally important for citizens to participate in the political process, and that prejudice prevents the targeted group from participating, or (2) by arguing that a rule that the legislator enacts by virtue of some prejudice of hers tends to be morally amiss, because prejudice is by definition a false belief and decisions predicated upon false beliefs tend to be wrong.

[*76] Although Ely intends to argue for version one of the process theory, n255 I believe that version two is the better one n256 - and in any event it is version two that helps M in Alcohol. M can hardly say that, because women failed to participate in the process of enacting the no-alcohol-for-men rule, his own treatment is unfair. n257 What M can say is that, because certain prejudices about women figured in the enactment of the rule, the rule's formulation does not meet minimum moral standards of epistemic reliability. Legislators who believe that men are superior to, or otherwise morally distinct from women, are likely to miscalculate the empirical effects, and normative significance, of the various actions that men and women perform. They may wrongly believe, for example, that young men are typically brash, or daring, or brave, and likely to run the risk of driving drunk. n258 A false belief about M's station, superior or not, may be tied up with false beliefs about his high willingness to take risks or do harm. M cannot complain of being stigmatized by a rule that discriminates against men, nor can he say necessarily that he has been treated unequally relative to similar actors, but M can say that he has been denied the minimum epistemic work to which he is entitled - the epistemic work of a legislature that knows, at least, the basic truth of the equal worth and station of men and women.

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n255. See Koppelman, supra note 219, at 39 (noting that "Ely purports to offer a constitutional theory ... in which judicial review is concerned solely with 'what might capaciously be designated process writ large - with ensuring broad participation in the processes and distributions of government'" (footnote omitted) (quoting Ely, supra note 253, at 87)).

n256. See infra text accompanying note 400 (describing counterintuitive consequences of first variant).

n257. M could say, I suppose, that the existence of prejudice against women, by preventing women from participating in a rule's formulation, has the instrumental effect of making the rule less reliable. This construal of version one of process theory is subject to the same kind of objection that I advance, here, against version two. It merely provides M a kind of epistemic<2> right.

n258. See Craig v. Boren, 429 U.S. 190, 202 n.14 (1976) (noting stereotype that " 'reckless' young men [will] drink and drive").

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This is, of course, just the idea of epistemic<2> rights that I earlier considered and rejected. n259 The problem with the idea, as I have suggested, is that it dilutes the case for judicial review, relative to the Derivative Account. The idea of epistemic<2> rights is feasible and nondilutive only in contexts where courts have direct, historical evidence about the prejudices that figured in a rule's formulation; and further where courts are not well-placed to determine whether morality requires a change in the rule's predicate. That may be true, for example, of nonconstitutional judicial review in the administrative law context; but it is not true in the equal protection con [*77] text, and Ely does not mean to claim otherwise. n260 Rather, Ely suggests, courts should scrutinize rule-predicates as evidence of the prejudices that may have motivated rule-formulators.

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n259. See supra text accompanying notes 218-25.

n260. See, e.g., Ely, supra note 253, at 146 (noting the "proof problems of a ... direct inquiry [into legislative motivation"). For a real-world example, see Craig, 429 U.S. at 199- 200 n.7 (noting that "[Oklahoma's] purpose is not apparent from the face of the statute and the Oklahoma Legislature does not preserve statutory history materials capable of clarifying the objectives served by its legislative enactments").

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The "special scrutiny" that is afforded suspect classifications ... insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit that closely, however, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fall. Thus, functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of "flushing out" unconstitutional motivation n261

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n261. Ely, supra note 253, at 146 (second emphasis added).

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But Ely's claim gets matters quite backwards. It is like saying that, because a tortfeasor caused harm to a victim, we have evidence that the tortfeasor imposed a risk on the victim. n262 What matters morally about the tortfeasor - or at least what matters more - is harming, not risking. Similarly, what matters more about Alcohol - more than the fact that prejudices against women figured in the enactment of the no-alcohol rule, such that more epistemic work about M is needed - is that nonepistemic moral reason obtains to invalidate the rule and to replace it with some kind of gender-neutral rule. If the predicate of the no-alcohol rule is morally imperfect, which is what the Court concluded in Craig v. Boren, n263 then the predicate may evidence the role of prejudices in the rule's enactment; but, more importantly, it shows that the rule should be repealed or amended. If the predicate of the no-alcohol rule is morally perfect (pace Craig), then we have not yet "flushed out" the prejudices that Ely would have us look for. A non-dilutive, predicate-based defense of the Direct Account does not exist.

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n262. See Perry, supra note 223, at 330-39 (arguing that risk is not harm, and ought not be compensable as harm in tort law).

n263. See Craig, 429 U.S at 204 (holding that "the relationship between gender and traffic safety [is] far too tenuous to satisfy [the constitutional]

requirement that the gender-based difference be substantially related to achievement of the statutory objective").

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4. The Group-Disadvantaging Principle

Finally, I consider the theory of equality Owen Fiss advanced in his well-known article Groups and the Equal Protection Clause. n264 [*78] Fiss argues that the Constitution prohibits practices that aggravate the subordinate position of a "specially disadvantaged group," paradigmatically blacks. n265 Blacks are a "social group" n266 - a social entity with a "distinct existence apart from its members" n267 - that "has been in a position of perpetual subordination," and whose "political power ... is severely circumscribed." n268 As a consequence, this social group falls within the protection of the Equal Protection Clause.

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n264. Fiss, supra note 108; see also Koppelman, supra note 219, at 76-92, 76 (surveying group-disadvantage theory within scholarship on discrimination: "The group-disadvantage theory looks beyond process and signification to the substantive social position of blacks and other disadvantaged groups").

n265. See generally Fiss, supra note 108, at 147-70 (explicating and defending "group- disadvantaging principle").

n266. Id. at 154.

n267. Id. at 148. This, along with what Fiss calls "interdependence" ("the identity and well-being of the members of the group and the identity and well-being of the group are linked," id.), are in Fiss's view the necessary and sufficient conditions for the existence of a social group.

n268. Id. at 154-55.

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Some state laws or practices may just be a mistake - they make all groups and all persons worse off, and equally so. These do not seem to be the concern of a constitutional provision cast in terms of equality. Equality is a relativistic idea. The concern should be with those laws or practices that particularly hurt a disadvantaged group. Such laws might enhance the welfare of society (or the better-off classes), or leave it the same; what is critical, however, is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group. This is what the Equal Protection Clause prohibits. n269

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n269. Id. at 157 (emphasis added).

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Fiss intends this theory to be quite distinct from the other theories of equality that are current within constitutional law, and that I have here considered: a theory of equal treatment for similarly situated individuals, a stigma theory, and a process theory. Unlike the equal treatment theory, which focuses upon how individuals fare relative to others, Fiss's theory is explicitly a non-individualistic theory. His concern is with the effect of laws and practices on "specially disadvantaged" groups, not on particular individuals: "The Equal Protection Clause should be viewed as a prohibition against group-disadvantaging practices, not unfair treatment.... [A] claim of individual unfairness [should be] put to one side ...." n270 And, by contrast with the stigma and process theories, for which it is crucial that laws discriminate on the basis of race or be motivated by [*79] racial prejudices, n271 discrimination is not central to Fiss. Part of the point of Fiss's article is to show that a racially neutral law that, nonetheless, aggravates the subordinate position of blacks, should be unconstitutional. n272

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n270. Id. at 160; see id. at 123, 148 (noting, and criticizing, individualistic cast of Tussman and tenBroek's theory).

n271. See Ely, supra note 253, at 145-70 (arguing for judicial focus on "suspect classifications" as evidence of unconstitutional motivation); Brest, supra note 238, at 26, 44-53 (arguing that discrimination, not disparate impact, is touchstone of Equal Protection Clause).

n272. See Fiss, supra note 108, at 141-46, 157-60, 170.

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As I have already explained, equal protection doctrine does not currently reflect this kind of view. A reviewing court will not invalidate the kind of law Fiss hopes to strike down - a racially neutral law that has a disparate impact upon blacks, and thereby aggravates their subordinate position. That has been the doctrine, for better or worse, since Washington v. Davis. n273 So the defender of the Direct Account cannot hope to explain the current pattern of equal protection rights using a Fissian theory. But even if doctrine were to change, and disparate impact were to become the touchstone for equal protection law, the Direct Account would not hold true.

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n273. 426 U.S. 229 (1976); see supra text accompanying notes 98-102 (discussing Court's rejection of disparate impact as sufficient condition for invalidating laws under Equal Protection Clause).

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Let us consider, once more, the B variant of Alcohol, now using a Fissian lens. A rule prohibits "black persons between eighteen and twenty-one" from purchasing alcohol. A black person B purchases alcohol using a stolen credit card, and is sanctioned pursuant to the rule. Are there sufficient grounds for the reviewing court to invalidate B's sanction, independent of further

invalidating the no-alcohol rule? A Fissian defense of the Direct Account runs into two serious difficulties, here: the first concerns the individuation of legal practices, and the second concerns the problem of marginal contribution.

Fiss would invalidate legal practices that aggravate the subordinate position of blacks; if sanctioning B contributes to such a practice, then there is Fissian reason to overturn B's sanction. But is the relevant legal practice: (1) enforcing the no-alcohol rule against those blacks whose actions are not sanctionable under other descriptions, or rather (2) enforcing the no-alcohol rule, period? This is very like the problem of defining comparison classes that I discussed above, in the context of the Tussman/tenBroek theory of equality. Sanctioning B is part of the second practice, but not the first.

Fiss stresses that his criterion for individuating "social groups" is natural, not artificial.

[*80]

[It] strikes me as odd to build a general interpretation of the Equal Protection Clause ... on the rejection of the idea that there are natural classes, that is, groups that have an identity and existence wholly apart from the challenged state statute or practice. There are natural classes, or social groups, in American society and blacks are such a group. n274

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n274. Fiss, supra note 108, at 148.

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Fiss continues: "[The] Equal Protection Clause [does not extend to] what might be considered artificial classes, those created by a classification or criterion embodied in a state practice or statute ...." n275 If this nonartificiality principle carries over to the individuation of group-disadvantaging practices themselves, the Direct Account will likely fail. A criterion that confines the relevant "practice" to (1) enforcing that portion of the no-alcohol rule that covers only blacks whose actions are not sanctionable under other rules, is nonartificial in the following sense: B's sanction will not contribute to the relevant Fissian "practice," whether she is sanctioned pursuant to the no-alcohol rule or instead for fraud. By contrast, a criterion that individuates the Fissian practice as (2) enforcing the entire no- alcohol rule, is artificial in the following, interesting sense: B's sanction will contribute to the Fissian practice if she is sanctioned pursuant to the no-alcohol rule, but will not contribute if she is sanctioned for the very same action of hers pursuant to a rule prohibiting fraud.

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n275. Id. at 156.

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But even if one individuates the Fissian practice along the lines of (2) rather than (1), the Direct Account likely fails. The problem here is the problem of marginal contribution. n276 The relevant practice, let us assume, is (2) enforcing the no-alcohol rule. Relative to a world in which the no-alcohol rule is repealed, fully enforcing the no-alcohol rule aggravates the subordinate position of the black group. Only blacks are sanctioned pursuant to the rule, and only blacks are coerced not to purchase alcohol. But relative to a world in which the no-alcohol rule is fully in force, with the exception of B's sanction, fully enforcing the no-alcohol rule only marginally ag [*81] gravates the subordinate position of the black group. B's sanction, taken alone, has only a vanishingly small effect on the social position of the black group. (The sanction is hard on B, but as we have seen, Fiss's concern is for blacks as a group, not for particular black individuals.) Therefore the Direct Account is false: the court does not have sufficient reason to overturn B's sanction, independent of further invalidating the no-alcohol rule. After all, B is a wrongdoer under another description; if she is not sanctioned pursuant to the no-alcohol rule, she may not be sanctioned at all. The vanishing contribution that freeing her makes to the social position of blacks is not weighty enough to outweigh the demands of retributive justice.

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n276. The idea that a particular action (here, sanctioning B) might be innocent by virtue of its marginal contribution to some disfavored state-of-the-world, even though a general practice of performing actions "like this" (however precisely that is defined) has bad consequences, is hardly a new one. That idea is precisely what helped animate rule-utilitarianism. See Lyons, supra note 123, at 2-17; Scarre, supra note 46, at 122-32. Lyons claims, famously, that act- and rule-utilitarianism are extensionally equivalent; but that does not entail that the enforcement of a textually entrenched rule cannot have overall consequences that are different from the consequences of an application. See Schauer, supra note 58, at 79-85 (arguing that Lyons's proof does not apply to "rules" understood as entrenched generalizations).

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The Fissian theory may provide a reviewing court reason to repeal or amend the no-alcohol rule, given the cumulative contribution that sanctioning and coercing lots of black individuals has on the subordinate position of the black group. But it does not provide the reviewing court a reason to invalidate B's sanction, without more, regardless of how we individuate practices for Fissian purposes.

C. Authority

I have considered, under the rubric of a theory of justified sanctions, and the rubric of a theory of equality, a wide range of possible defenses of the Direct Account. A justified-sanction defense might be nonepistemic or epistemic. As for the first, I considered several plausible rule-dependent theories of sanctioning (specifically, expressive and deterrent theories); as for the second, I considered several plausible theories of epistemic rights (what I called epistemic<1> rights and epistemic<2> rights). And under the rubric of equality, I analyzed seriatim the four specific theories most visible within constitutional scholarship and doctrine: (1) a Tussman/tenBroek theory of equal treatment, (2) a stigma theory, (3) a process theory, and (4) a

group-disadvantaging theory. I have argued that none of these defenses underwrites the Direct Account for any of our stylized cases, with the following exception: the stigma theory explains the B and W variants (but not the M variant) of Alcohol. This is a modest harvest, indeed, for the Direct Account.

Are there further moral arguments that the defender of the Direct Account might advance? If it is true in our stylized cases (leaving aside the B and W variants of Alcohol) that X's sanction is [*82] (prima facie) n277 justified under a nonepistemic theory of sanctions; that constitutionally sufficient epistemic work has been done to determine that; and that X has no equality claim sufficient to warrant overturning her sanction independent of further invalidating the rule R under which it falls, then it is hard to see what further arguments (more or less connected to the moral criteria at stake in our stylized cases) remain for our defender. I see only one real possibility, and I will briefly consider that here. n278

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n277. I say "prima facie" to leave open the possibility that the sanction might be, all things considered, unjustified, say because it violates an equality norm.

n278. What about a defense of the Direct Account based on legislative motivation? The idea of illegitimate legislative motivation, or purpose, has long been popular within constitutional scholarship. See Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95; John Hart Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Symposium, Legislative Motivation, 15 San Diego L. Rev. 925 (1978). For a recent, important addition to this scholarship, see Pildes, supra note 166, at 761 (arguing that constitutional rights "are ways to channel the kind of reasons and justifications government can act on in different domains"). Note however that the idea of illegitimate legislative motivation is ambiguous and, without further elaboration, unhelpful. To say that the legislator's motivation is "illegitimate" is to say that it is, somehow, morally problematic - but how?

I see four cogent ways to cash out the illegitimate-motivation idea within the Direct Account. One might say that the rule-formulator's mental state (motivation, etc.) in formulating rule R has: (1) direct moral import, in rendering X's otherwise-innocent treatment pursuant to R wrongful; or (2) epistemic import, in requiring that society do more work to determine the propriety of that treatment; or (3) import for authority, in depriving R of authority; or (4) import for culpability, in making the rule-formulator culpable for the wrong done to X. But I have considered, or will consider, each of the first three possibilities: the first maps onto the stigma theory, the second onto the idea of epistemic<2> rights, and the third onto the notion of authority. As for the fourth: absent some independent explanation why X's treatment is wrong, the rule-formulator's culpability does not explain why we should overturn it. At best it explains why we should punish the rule-formulator.

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That possibility is a theory of authority. By "authority" I mean what the term means within contemporary jurisprudence: a rule has "authority" if the

enactment of that rule, in some way, provides the actors and/or state officials subject to the rule additional reason (in particular, additional moral reason) to do what the rule authorizes or requires. n279 "Reason" here is meant to encompass both [*83] reasons for belief and reasons for action - a distinction whose import will soon become apparent.

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n279. See Hurd, supra note 169, at 1615-20 (discussing "theoretical authority," "influential authority," and "practical authority"). Each of these represents a different way that an utterance might, arguably, change the moral reasons bearing upon the actor who receives the utterance. The utterance of a "theoretical" authority provides the actor with a first-order reason for belief; the utterance of an "influential" authority provides the actor with a first-order reason for action; the utterance of a "practical" authority provides the actor with a second-order reason for action. We should note a fourth possibility: that an utterance might provide the actor a second-order reason for belief.

Each of these four possibilities is indeed represented in the literature on authority. See id. at 1667-77 (arguing that authority consists of first-order reasons for belief); Michael S. Moore, Authority, Law, and Razian Reasons, 62 S. Cal. L. Rev. 827, 871 (1989) (first-order reasons for action); Raz, supra note 169, at 23-69 (second-order reasons for action); Donald H. Regan, Authority and Value: Reflections on Raz's Morality of Freedom, 62 S. Cal. L. Rev. 995, 1001-18 (1989) (second-order reasons for belief). For other recent work on authority, see Larry Alexander, Law and Exclusionary Reasons, Phil. Topics, Spring 1990, at 5; Leslie Green, The Authority of the State (1988); Stephen R. Perry, Second-Order Reasons, Uncertainty and Legal Theory, 62 S. Cal. L. Rev. 913 (1989); and Schauer, supra note 58, at 128-34.

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Authority, in this sense, is fundamental to law and legal systems. It is, obviously, a fundamental moral question whether and how the enactment of legal rules changes moral requirements. Is there a moral obligation to obey the law? We will need a theory of authority to answer that. Further, the concept of authority may have conceptual significance in delineating the very concept of law. One can plausibly say that a given deontic proposition - such as "No vehicles may be driven in the park," or "All adult males must deliver a sacrifice for the Sun God" - only exists as a legal rule if, at a minimum, a sufficient number of actors, or at least state officials, take the proposition to be authoritative, claim to do so, or are instructed to do so by other rules. n280 Relatedly, what it means to be sanctioned "pursuant to" a particular legal rule R is plausibly something like this: it means that state officials impose a sanction upon you, by virtue of the moral reasons that these officials take or claim R's enactment to create.

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n280. See Schauer, supra note 58, at 126 ("To say that a rule exists within some decisional environment is ... to say that the decision-makers in that environment ... treat the rule as relevant to the decisions they are called upon to make."). Arguably, a legal rule can exist where state officials do not take or claim it as authoritative, but are simply instructed to do so, e.g., a

conduct rule that is legally valid and enforceable under applicable rules governing the enactment and enforcement of conduct-rules, but that state officials and actors are now ignoring.

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The following idea might therefore seem tempting to the defender of the Direct Account:

Constitutional Rights as Authority-Rights

If X has been sanctioned pursuant to a rule R that truly lacks authority, for her n281 - if the enactment of the rule R does not create fresh moral reason for X to do what the rule requires, and does not create fresh moral reason for state officials to sanction X when she breaches the rule - then there is sufficient moral reason to overturn X's sanction, independent of further invalidating R. For to say that state officials have sanctioned X "pursuant to" R means that these officials have taken or claimed R to be authoritative, with respect to X; and by hypothesis R is not authoritative in this way.

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n281. I say "for her" because authority may be piecemeal. See Moore, supra note 279, at 833-37 (discussing piecemeal cast of authority, within Razian account, for citizens if not state officials).

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[*84] But this idea, tempting as it might seem, is flat wrong. I will assume, for the sake of argument, that the rules in our stylized cases lack true authority, for some or even all of the actors or state officials subject to these rules. Even so, the Direct Account does not obtain. Why not? Because the premise that rule R lacks authority, with respect to X and the officials who sanction X pursuant to R - the officials who, let us assume, incorrectly take or claim the rule to provide fresh reason for sanctioning X - does not in fact warrant the conclusion that there is sufficient moral reason to overturn X's own sanction, independent of further invalidating the rule under which the sanction falls.

Let us back up a moment. Why might a legal rule R possess true authority? How might R's enactment change the moral reasons bearing upon the actors and/or state officials subject to R? This is a question of much currency and controversy among legal theorists. One view of authority - the revisionist view - sees legal authority as merely epistemic. n282 On this view, the enactment of a legally authoritative rule merely changes the reasons for belief that actors and state officials subject to the rule possess. Because the rule- formulator is epistemically reliable, her enactment of R constitutes a fresh reason for those actors to believe that the actions identified by R are wrongful, and for state officials to believe that those actions are sanctionable. As Heidi Hurd explains:

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n282. This is a little tricky. Someone who believes that authority entails reasons for action, as does Raz, might nonetheless believe that an

authoritative utterance changes the subject's reasons for action by virtue of the authority's epistemic capacities - as does Raz. See supra note 169 (discussing epistemic strain in Raz). But Raz does not believe that authority is merely epistemic, in the sense of merely changing the subject's reasons for belief. Hurd does.

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One in a position to give good advice concerning how another ought to act in certain circumstances possesses theoretical authority, at least over some range of deontic propositions. The utterances of a theoretical authority provide reasons for belief, not reasons for actions. They function, that is, evidentially. When a theoretical authority makes a claim concerning right action, its utterance provides a reason to think that there are other reasons (besides the sheer fact that the authority has spoken) to act as recommended. The prescriptions of such a theoretical authority are thus heuristic guides to detecting the existence and determining the probable truth of antecedently existing reasons for action. n283

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n283. Hurd, supra note 169, at 1615.

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Hurd argues that legal authority does this, and no more: an authoritative legal rule, issued by a sufficiently reliable legislator, simply evidences preexisting moral requirements. n284

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n284. See id. at 1667-77.

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[*85] Assume Hurd is correct. Then to say that the flag-desecration rule, etc., lacks "authority" for X is simply to say that, for the particular action of flag-desecration X performed, the fact that this action fell under the flag-desecration rule created no reason for X to believe the action wrong, and now creates no reason for state officials to believe the action sanctionable. In short, all the Hurdian can say, in defense of the Direct Account, is that we ought to perform more epistemic work to determine whether X should be sanctioned. On the Hurdian view, authoritative legal rules function only to facilitate our moral inquiry; thus the claim that the flag- desecration rule, etc., lacks authority with respect to X's sanction can only entail that we must inquire further into the wrongfulness of X's action.

So a Hurdian authority-right must be some kind of epistemic right. But which X's have this epistemic right as a constitutional matter? Surely not every X for whom a rule lacks authority. Again, if Y is sanctioned pursuant to a rule R that prohibits "the sale of filled milk" (enacted by legislators who have been

"captured" by competing manufacturers), and Y is a nutritionist who appreciates the true benefits of filled milk, then this rule likely lacks Hurdian authority for Y. n285 But sanctioning Y doesn't violate his constitutional rights. n286 Thus the Hurdian defender of the Direct Account must identify either some constitutionally special property of X's action that works as an epistemic trigger, or some constitutionally special error-type that infects the process of formulating rules, and deprives them of authority. In short, a Hurdian authority-right will be very much like what I earlier called an epistemic<1> right or an epistemic<2> right. I have already discussed why these types of epistemic rights do not underwrite the Direct Account, and I will not belabor the discussion here.

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n285. Cf. Raz, supra note 169, at 100 (noting that "the authority of the state may be greater over some individuals than over others .... [One person] may prefer to decide for himself, and be willing to invest the time and effort it takes to enable himself to decide wisely"). It is hard to see how a Hurdian could disagree with this claim.

n286. See supra text accompanying notes 206-10.

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What if Hurd is wrong? Hurd's epistemic view of legal authority is, as I have said, revisionist. By contrast, on the traditional view, legal authority is more than epistemic. It involves reasons for action, and not just reasons for belief. For the traditionalist, the enactment of a truly authoritative rule actually changes - indeed, displaces n287 - what morality requires of the actors and/or state offi [*86] cials subject to the rule, rather than merely evidencing preexisting moral requirements. As Hurd explains, summarizing the traditional view:

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n287. "Displaces" entails second-order reasons for action, while "changes" merely entails first-order ones. See supra note 279.

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One who utters a command certainly purports to give another a new reason for action. The mother who instructs her son to take his umbrella intends her son to take the very fact that she has issued such a command as itself a reason for using an umbrella. If the mother is asked by her son why he must carry the despised object, the mother can well be expected to invoke the time-honored reason, "Because I told you to," and to anticipate that this very fact will be a reason above and beyond the ones that the child antecedently had to take his umbrella. [Indeed] the "Because I told you to" purports to give more than just a new reason for action.... Rather [it] purports to give the son, by itself, a normatively sufficient reason to take his umbrella: it implicitly claims ... to bar action on his part in accordance with the reasons that he previously possessed not to take his umbrella. n288

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n288. Hurd, supra note 169, at 1618.

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This traditional view of authority might seem to give comfort to the defender of the Direct Account, for then the claim that the flag- desecration rule, etc., lacks "authority" for X does not reduce to the epistemic claim that we need to do more epistemic work about X. Rather, and more robustly, the traditionalist can say that the flag- desecration rule, etc., has failed to perform the morally transformative function - for X and the state officials sanctioning her - that truly authoritative rules perform.

But so what? If the rule was not traditionally authoritative, then it did not provide X moral reason to refrain from performing her action. But this does not mean that X lacked any moral reason whatsoever to refrain from performing that action. If the action was also an action of battery, etc., then X had moral reason not to perform it because (1) the action was morally wrong, quite independent of falling under any legal rule; and further (2) the action presumably violated another authoritative rule, viz., the rule against battery, etc. The traditional theory of authority is not a theory of the necessary conditions for moral wrongdoing; no one believes that, unless an action is illegal, it is not immoral. n289 Rather, the traditional theory identifies a sufficient condition for moral wrongdoing: violating an authoritative legal rule. So, whether or not the rules in our stylized examples possessed traditional authority, X's actions were morally wrong - and that is doubly true if they violated authoritative rules picking out "battery," etc.

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n289. See Adler, supra note 4, at 803-04 (criticizing super-shallow moral conventionalism). As Joel Feinberg puts it: "One can wrongfully kill whether or not there is a criminal law of homicide." Feinberg, supra note 57, at 20.

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[*87] As for the decision by state officials to sanction X: if retributivism is true, then these officials had sufficient moral reason to sanction X, quite independent of whether the rule they took as authoritative possessed traditional authority, or satisfied other "expressive" or deterrent conditions. (If retributivism is true then these officials (1) had sufficient reason to sanction X, independent of her action falling under any rule, and further (2) sufficient reason to sanction X, by virtue of her breaching a rule that was authoritative, albeit a rule different from the one actually applied by the officials.) The traditional theory of authority does not displace theories of sanctioning, just as it does not displace theories of moral wrongdoing. It is, again, not a theory of the necessary conditions for state officials to impose a sanction, but a theory of the sufficient conditions. The traditional theory says that, if the state enacts an authoritative decision rule, state officials have sufficient reason to sanction actions violating the rule. It does not say that, absent such a rule, state officials have no such reason.

D. Duties Rather than Sanctions?

This Part has considered, at some length, whether the Direct Account holds true for sanctions: whether moral reason might obtain for a court to overturn X's sanction pursuant to a rule R, independent of further invalidating the rule, and despite the fact that the action by virtue of which X has received that sanction is (or might be) proscribable under a different description. I have focused specifically upon sanctions, rather than discussing sanctions and duties together, because of the analytic clarity that a focused discussion brings; and, as between sanctions and duties, I have focused on sanctions, rather than duties, because (under Supreme Court doctrine) it is paradigmatically the imposition of a sanction upon X that gives her a justiciable, constitutional complaint. No one doubts that, where X has performed an action in breach of a rule R, and has been prosecuted, convicted, and sanctioned for that breach, the prerequisites for constitutional adjudication will be satisfied: X will have "standing" to challenge the sanction, her claim will be "ripe" and not "moot," and the judicial decision will not be merely advisory. n290 By contrast, at least in the past, the justiciability of a constitutional challenge by some X to a legal duty [*88] that she has not yet breached has been open to question. n291 Does the duty imposed by R truly constitute a setback for X? Does it truly coerce her? Does she truly intend to perform actions that breach R and, if so, is there a realistic chance that she will be prosecuted and sanctioned for doing so? These kinds of questions, at least in the past, gave the Supreme Court some pause in permitting prospective constitutional challenges to duties; and although such justiciability concerns have over the last half century largely faded from view, there are signs that they may, yet again, become important. n292 These concerns make good sense within the Direct Account, because on that account the purpose of constitutional adjudication is to relieve X of an improper legal setback to her. If X's duty is, in truth, no real setback at all, then on the Direct Account judicial intervention is unwarranted.

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n290. See Erwin Chemerinsky, Federal Jurisdiction Ch. 2 (2d ed. 1994) (surveying justiciability requirements); United Pub. Workers v. Mitchell, 330 U.S. 75, 86-94, 92 (1947) (dismissing as nonjusticiable a pre-enforcement free speech challenge to the Hatch Act, but permitting a challenge where the claimant had already been charged with a violation of the Act and a proposed sanction had been entered; "this [post-enforcement] proceeding so limited meets the requirements of defined rights and a defined threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint").

n291. See Mitchell, 330 U.S. at 86-91.

n292. See infra text accompanying notes 588-97 (discussing justiciability of duties, particularly the ripeness of preenforcement constitutional challenges to conduct-regulating and other rules).

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Thus my focus, in this Part, upon sanctions rather than duties. But, as we have seen, the sanction-focused Direct Account fails to measure up. It fails to explain why the paradigmatic setback to X - a sanction - should be invalidated in most of our stylized cases. This failure might prompt the advocate of the

Direct Account to reconfigure her defense of that view. She might claim that duties, even more than sanctions, should be seen as the central treatment- types that constitutional claimants are entitled to challenge. For example, where a would-be flag-desecrator X brings a prospective challenge to a rule that stipulates "no person shall desecrate a flag of the United States," perhaps the Direct Account successfully explains why moral reason obtains for a court to free X from that duty, independent of further invalidating the flag-desecration rule?

Or perhaps not. A duty-focused reconfiguration of the Direct Account poses a number of serious difficulties. The first concerns the overall simplicity and coherence of such an account. The Derivative Account provides a simple and unified theory of judicial review: a constitutional challenge by X to R, whether a prospective or a retrospective challenge, is simply an occasion for judicial repeal or amendment of R. By contrast, even if the Direct Account succeeds in showing that X's prospective challenge to R concerns the moral propriety of X's own duty, the problem remains that (as I [*89] have argued at length) X's retrospective challenge to her sanction under R cannot be equally "personal." What, then, is the function, within a duty-focused Direct Account, of a retrospective constitutional challenge? X's retrospective challenge to his sanction must be an occasion for judicial repeal or amendment of rule R or, at best, for judicial invalidation of X's duty (not merely his sanction). So we are left with a complex, hybrid account where challenges to certain legal setbacks (duties) concern the moral propriety of those particular setbacks, but challenges to other setbacks (sanctions) do not.

A second and even more serious problem is this: refocusing the Direct Account on duties rather than sanctions does not eliminate the problem of multiple description that our stylized cases are meant to exemplify, and that bedeviled the sanction-focused account. The problem was that the particular action, which X performed in breach of R and by virtue of which he was sanctioned, might be wrongful under another description. X's action of flag- desecration might also be an action of pollution, arson, or battery, and yet his sanction pursuant to the flag-desecration rule would nonetheless violate the First Amendment. None of the defenses of the Direct Account that I explored could make sense of this crucial feature of constitutional rights. Now, it is tempting to think that the problem of multiple description disappears when we turn from sanctions to duties - the flag-desecration rule prohibits X, prospectively, from performing a class of actions, some of which may prove harmless - but this temptation should be avoided. Imagine two actors, X<1> and X<2>. X<1> is a violent anarchist, who seeks to foment disorder by burning stolen flags, or by burning them in proximity to bystanders; X<1>'s actions of flag-desecration are, virtually always, wrongful under other descriptions. X<2>, by contrast, is a pacifist war-protester, who eschews physical violence and takes great care to ensure that his actions of flag-desecration are innocent of nonexpressive wrong. Morality might well require that X<2>, but not X<1>, be freed from the duty that the flag-desecration rule imposes upon these actors. The mix of actions that X<2> would perform, but for the existence of a legal rule prohibiting flag-desecration, is different from the mix that X<1> would perform; and the morality of subjecting each actor to the no-flag-desecration duty should, it seems, depend in part upon this personal mix.

This poses a dilemma for the defender of the Direct Account. Either she insists (1) that the constitutionality of X's duty under rule R does not depend at all upon the personal mix of actions that [*90] X would perform, but

for R; or she says (2) that the constitutionality of X's duty under R does depend in part upon X's personal mix. The first alternative is unattractive, because the defender must then confront the problem of explaining why, as a moral matter, both X<1> and X<2> have a moral right to be freed from their respective duties pursuant to R, independent of their respective personal mixes. This is the precise analogue of the problem that, in the case of sanctions, the Direct Account was unable to resolve. The second alternative is unattractive because it forces a dramatic revision of existing constitutional practice: in practice, adjudication of prospective constitutional challenges does not involve a judicial inspection of the claimant's personal act-mix. n293

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n293. See supra Part I (discussing morally limited, rather than morally complete, nature of judicial inquiry in constitutional cases).

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Finally, a duty-focused Direct Account runs into serious difficulties with cases such as Residential Picketing, Animal Sacrifice, and the M variant of Alcohol, n294 where - quite apart from this issue of multiple description - there is no apparent moral reason to overturn the claimant's own duty. n295 Consider Residential Picketing: a rule provides that "no person shall picket a residence or dwelling, except for persons engaged in labor picketing." X, a nonlabor picketer, challenges his own duty pursuant to this rule. Assume that the actions X would perform, but for the rule, are not wrongful under other descriptions; freed from the rule, X would simply engage in otherwise-innocent actions of residential picketing. Even so, it is hard to see why it would violate X's moral rights to subject him to the no-picketing rule, given that - as the Court has held - the constitutional problem in Residential Picketing could be cured by a broader rule without the exemption for labor picketing. n296

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n294. In the B and W variants of Alcohol, a stigma argument works for duties, as it does for sanctions. See supra section II.B.2.

n295. Specifically, there is no apparent nonepistemic moral reason. An epistemic account is available, for duties as for sanctions, but - as I have already discussed - the epistemic account is dilutive. See supra text accompanying notes 220-25; supra section II.B.3.

n296. See Frisby v. Schultz, 487 U.S. 474 (1988) (upholding law generally barring residential picketing); infra text accompanying notes 370-83 (discussing rules that violate Discrimination Schema, such that these rules can be cured by broadening their scope).

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Can X say that he has been treated unequally, relative to labor picketers, and that this is why his own moral rights are violated by the narrower but not broader no-picketing rule? This equal treatment rationale might explain the M variant of Alcohol, which involves the Equal Protection Clause, but it is less responsive to the moral concerns underlying the First Amendment, and therefore less [*91] persuasive for a case such as Residential Picketing or Animal

Sacrifice. n297 Further, an equal treatment rationale for why the duties imposed in Residential Picketing, Animal Sacrifice and Alcohol are morally problematic leads us back to the problem of personal mix. Take, for example, a nineteen-year-old male M who is obliged not to purchase alcohol pursuant to a gender- discriminatory rule. Whether he is in fact treated unequally compared to others will depend on how the comparison class of "others" is defined - as we have already seen. n298 If the relevant "others" are defined as M's moral equivalents in all respects (not just relative to the purposes of the rule), then the contours of that comparison class will, in turn, depend upon M's personal mix. And we are then back to the dilemma sketched out above: either judicial review prescinds from the prospective challenger's personal mix (leaving the Direct Account on shaky ground) or it does not (forcing a dramatic revision of existing constitutional practice).

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n297. I take the antidiscrimination component of the First Amendment to be concerned with morally irrelevant properties, such as viewpoint or religious status, and not with equal treatment. See infra section III.A.2 (defending Discrimination Schema).

n298. See supra text accompanying notes 233-35.

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In short: for reasons of overall coherence and simplicity, and because of problems internal to a duty-focused Direct Account, reconfiguring the Direct Account around duties rather than sanctions does not look to be a promising strategy for salvaging it.

III. The Derivative Account

The Direct Account makes robust moral demands on the content of constitutional rights. It claims that having a constitutional right entails the existence of sufficient moral reason for a court to overturn the rights-holder's duty or sanction, independent of further invalidating the legal rule that imposes this duty upon the rights-holder, as well as others, and authorizes state officials to sanction her, as well as others. But cashing out this claim has proved morally tricky. It has proved tricky to show how moral reason of this robust sort could obtain, at least for the substantive rights against conduct-regulating rules that now have currency within constitutional law: rights to free speech, free exercise, equal protection, and substantive due process. In Part II, I considered a variety of moral theories that might support the Direct Account: nonepistemic and epistemic theories of sanctioning; theories of equality; and theories of authority. These theories failed, singly and collectively, to do the requisite moral work.

[*92] It is time to defend a different view of constitutional rights: the Derivative Account. On that account, constitutional rights are morally derivative. To say that sanctioning X pursuant to rule R, or subjecting her to the duty that R imposes, is "unconstitutional" or "violates X's constitutional rights" is simply to say this: there is sufficient moral reason to invalidate that rule. The Derivative Account conceptualizes judicial review as a legal institution whose function is the invalidation of rules, not merely the invalidation of the particular sanctions or duties of the rights-holders who

happen to initiate the judicial process. By "invalidation," I mean a judicial utterance roughly equivalent in legal import to a legislative repeal. n299 A repeal is an utterance, by the rule-formulator (agency or legislature), that generally rescinds the legal force of the rule. It frees all actors from the legal duty that the enactment of the rule created, and deprives all state officials of the legal power to sanction actors pursuant to the rule. The Direct Account trades on a traditional, purist view of the powers of reviewing courts, that sees a court as empowered merely to rescind the duty of X and the power of state officials to sanction her. By contrast, the Derivative Account insists that - in order to make moral sense of constitutional rights - reviewing courts must be understood to have rule- repealing powers roughly equivalent to the repealing powers of agencies and legislatures, and to be exercising those broad powers whenever courts credit claims of "constitutional right" or hold the treatment of rights-holders to be "unconstitutional."

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n299. "Roughly" is meant to signal certain technical differences between judicial invalidation and legislative repeals, such as these: a judicial invalidation might be a partial invalidation or an extension rather than a facial invalidation, see infra text accompanying notes 414- 21; a judicial invalidation might leave open the possibility that a rule's authoritative interpreter can revive it through a narrowing construction, see infra text accompanying notes 416- 17; and a subsequent judicial overruling of the invalidation decision might "revive" the invalidated statute, see William Michael Treanor & Gene B. Sperling, Prospective Overruling and the Revival of "Unconstitutional" Statutes, 93 Colum. L. Rev. 1902 (1993). But judicial invalidation is, crucially, like a legislative repeal in having general scope, rather than being confined to a particular claimant.

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Let me articulate the Derivative Account as clearly as possible:

The Derivative Account

To say that some rule R "violates X's constitutional rights" entails the following: there is sufficient moral reason to change R's predicate in some measure, and X has the legal power to secure some kind of judicial invalidation of R. To say, more specifically, that a treatment of X (being sanctioned pursuant to a rule R, or subjecting X to the duty that R announces) "violates X's constitutional rights" entails the following: there is [*93] sufficient moral reason to change R's predicate in some measure, and X has the legal power to secure some kind of judicial invalidation of R, including the invalidation of X's own treatment.

By a "rule," again, I mean a conduct-regulating, sanction-backed rule that has a canonical, written formulation and that becomes authoritative through enactment by a legislature or agency. I assume that rules are individuated in some kind of text-based way. n300 That is, an "individual" rule is some textually-defined portion of the entire corpus of canonically formulated rules - a single deontic sentence, a single term in a deontic sentence, or a single provision made up of several sentences. How precisely to individuate rules is a technical problem that may depend in part on your precise conception of free speech, equal protection, free exercise, and the other moral criteria

referenced by the Bill of Rights. My defense of the Derivative Account is agnostic within the family of text-based individuation criteria, and is meant to be consistent with all of them.

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n300. See supra text accompanying notes 137-39 (discussing individuation).

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The Derivative Account says the following of a (textually individuated) rule: there is sufficient moral reason n301 to change in some measure the predicate of the rule. By this I mean the following: There is sufficient moral reason either (1) to narrow the scope of the rule R, that is, to exclude from the rule's coverage some class of actions now included within the rule, thereby freeing all actors from the duty not to perform that class of actions (except where covered by another rule) and disentitling all state officials from sanctioning actions within that class (except where covered by another rule); or (2) to broaden the scope of the rule, that is, to include within the rule's coverage some class of actions not now covered; or (3) to partly narrow and partly broaden the scope of the rule; or even perhaps (4) to replace the rule's predicate with a different but coex [*94] tensive description of actions. n302 The Derivative Account does not, necessarily, envision that reviewing courts will secure the particular change in the predicate of the rule R that morality supports. Consider, for example, our stylized case Abortion, where a rule prohibits any person from "procuring an abortion." One variant of the Derivative Account might stipulate that the reviewing court should "facially" invalidate the no-abortion rule: it should issue a legal utterance whose import is to preclude the enforcement of the rule against anyone. Another variant of the Derivative Account might stipulate that the reviewing court should "partially" invalidate the no-abortion rule: it should specify some proper subset of the actions covered by the rule - for example, abortions of non-viable fetuses - against which the rule may not be enforced. What variant of the Derivative Account is correct is a matter for further discussion and debate, which I will pursue as needed below. n303

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n301. I emphasize again that "moral reason" is meant to encompass both consequentialist and deontological accounts. To say that "moral reason" obtains to change R's predicate means either that this change is required by a deontological norm, or that it improves the world under applicable consequentialist criteria and is deontologically permissible. Whether the criteria set forth in the Bill of Rights are wholly consequentialist, partly consequentialist, or wholly deontological, cf. T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943 (1987) (chronicling rise of "balancing" methodology in constitutional adjudication), the Derivative Account is morally straightforward. The deontologist will say that moral reason obtains to overturn a duty-imposing rule backed by sanctions, because that kind of threat violates a deontological constraint; the consequentialist will say that the threat causes or constitutes a worsening of the world.

n302. This is the kind of replacement that a stigma theorist might, perhaps, demand. Again, I take the most powerful account of "stigma" to be where a rule's predicate that is suboptimal in scope evidences the role of false beliefs in its production; but I leave open the possibility of a predicate being stigmatic

even though its scope is morally optimal (and thus this predicate is properly replaced with a nonsynonymous, but coextensive predicate). See Richard L. Kirkham, Theories of Truth: A Critical Introduction 3-14 (1995) (distinguishing between the extensional equivalence of two terms, their necessary extensional equivalence, and their synonymity).

n303. See infra section III.A.3.

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My defense of the Derivative Account will proceed in two stages. The main attraction of the Derivative Account is that it is morally straightforward; it is straightforward that moral reason can obtain to change, in some measure, the predicate of a rule. Section A defends this claim, and in particular demonstrates how the moral criteria set forth in the Bill of Rights - criteria such as free speech, free exercise, equal protection, and substantive due process - can straightforwardly be understood as criteria by which to measure the predicates of rules. The Court's current free speech, free exercise, equal protection, and substantive due process case law can be explained, in a simple and straightforward way, by the Derivative Account. We will have no difficulty accounting for the various stylized cases that are meant to exemplify this case law - Abortion, Child Pornography, Flag Desecration, and so on - and that proved so difficult for the Direct Account to explain.

Section B addresses the various issues left open by the moral arguments provided in section A. To say that rules can go morally awry is one thing; to say that a particular body should invalidate rules, by virtue of their being awry, is quite another. Do courts truly have the power to invalidate rules? How is this notion of their [*95] role consistent with the concept of a "constitutional right" or the concept of adjudication? In what way do the legal utterances that issue from reviewing courts, and that often appear to be directed merely at particular litigants, function to repeal or amend rules? The critic of my view of constitutional rights might concede my moral point (that the moral criteria referenced in the Bill of Rights can be understood as criteria by which to measure the predicates of rules), but nonetheless raise further, institutional objections to the Derivative Account. I rebut these further objections in section B.

A. Rules that Go Awry: The Moral Foundations of Judicial Review

Rules can go morally awry in multiple ways. A rule might exacerbate distributive injustice, by having a disproportionate impact upon persons who already receive far less than distributive justice requires. n304 It might produce certain unwanted states of affairs: for example, the state of affairs where citizens who have a particular, contestable viewpoint on a matter of public import are heard in disproportionate numbers, and "drown out" the opposition; n305 or the state of affairs where members of different religious groups are engaged in civil strife, which distracts and even destabilizes the polity. n306 A rule might violate the requirements of equality - not by exacerbating distributive injustice as above, but rather by producing differential treatment for actors whose actions are morally identical. n307

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n304. Cf. Cass R. Sunstein, The Partial Constitution 338-46 (1993) (arguing that Equal Protection Clause embodies an anti-caste principle); Fiss, supra note 108, at 157 (arguing that Equal Protection Clause prohibits laws that aggravate the subordinate position of a disadvantaged group).

n305. See Stone, supra note 218, at 217 (noting that a "possible explanation for the content-based/content-neutral distinction [within free speech doctrine] derives from the fact that content-based restrictions, by their very nature, restrict the communication of only some messages and thus affect public debate in a content-differential manner"). I do not deny that content-based laws which go morally awry in biasing debate are properly invalidated; but I do deny that content-based laws are properly invalidated solely by virtue of their predictably biasing debate.

n306. See Douglas Laycock, Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313, 317 (1996) (arguing that Religion Clauses have the "negative goal" of minimizing religious conflict, and the "affirmative goal" of "creating a regime in which people of fundamentally different views about religion can live together in a peaceful and self-governing society").

n307. See Tusmman & tenBroek, supra note 229, at 344 (arguing that the Equal Protection Clause requires "that those who are similarly situated be similarly treated").

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All of these are possible - even constitutionally plausible - explanations of how rules go morally awry. But, in fact, constitutional law needs none of them. There are two basic moral schemas [*96] - two different ways in which moral reason obtains to change the predicate of rules - that together suffice to explain the entire range of existing constitutional rights under the Free Speech Clause, Free Exercise Clause, Equal Protection Clause and the substantive component of the Due Process Clause, at least with respect to the central case of conduct-regulating rules backed by sanctions. These two schemas are the Liberty Schema and the Discrimination Schema. The Liberty Schema explains, in a crisp way, cases such as Flag Desecration, Abortion, and Child Pornography that together exemplify most (although not all) n308 of the Court's free speech case law, and all of its substantive due process case law. The Discrimination Schema explains, in a crisp way, cases such as Residential Picketing, Alcohol, and Animal Sacrifice that together exemplify the remainder of the free speech case law, and all of the Court's equal protection and free exercise case law.

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n308. The free speech decisions that are not explained by the Liberty Schema - the decisions exemplified by Residential Picketing - are in part what motivate the Discrimination Schema.

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In saying that these two schemas, the Liberty Schema and Discrimination Schema, suffice to explain the Court's free speech, etc., case law, I mean simply this: virtually all the cases in which the Court has recognized claims of constitutional right under the free speech, etc., clauses can be explained as cases in which the underlying rules fit the pattern of moral invalidity set

forth by either the Liberty Schema, the Discrimination Schema, or perhaps both. n309 Further, as we shall see, the schemas are grounded upon plausible and standard theories - articulated both by the Court and by constitutional scholars - about the right way to understand the moral criteria of free speech, etc. What I do not mean to say that is all constitutional doctrine or dicta, under the free speech, etc., clauses, are consistent with the Derivative Account. At a minimum, the standard and oft-articulated doctrine that constitutional rights are "personal" rights, in the sense elaborated by the Direct Account, will have to be abandoned. n310 Clearly - and indeed this is what animates my article - the Derivative Account is in part revisionary. It revises the standard view of constitutional rights, and whatever doctrine or dicta depend upon it. But the Derivative Account does not require revising our understanding of the moral criteria underlying constitutional law, or counting as misconceived those cases in which the Court has in fact honored rights-claims.

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n309. On "both," see infra note 369.

n310. See supra note 148 (citing cases).

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[*97] What if you are not convinced that the Liberty Schema and the Discrimination Schema, together, adequately cohere with the moral criteria of free speech, free exercise, equal protection, and substantive due process, and with the case law by which the Court has fleshed out these criteria? Or, what if you are convinced of this but further believe that the case law should be substantially overhauled? Then you may well want to develop some other schema or schemas for morally invalid rules: a distributive-justice schema, a balanced-debate schema, or whatever. You will flesh out the Derivative Account in a way that is, in its details, significantly different from my account. What you will not want to do is return to the Direct Account, unless you think that Part II's criticisms of that Account were ineffective. To accept those criticisms, but disagree with my two schemas, is not to reject the basic argument of this article: that constitutional adjudication essentially involves the invalidation of rules. For if you accept those criticisms, then you commit yourself to developing one or more schemas that explain how rules go morally awry, and cohere with plausible theories of the underlying moral criteria and (depending on your analytic project) with the constitutional case law as well. n311

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n311. My analytic project is to show, not just that the Derivative Account is constitutionally better, but that it is a better account of current practices. Thus, I develop and argue for two rule-validity schemas that fit with and, together, fully explain the existing case law. I further believe that the schemas are justifiable in the light of constitutional criteria, quite apart from the case law - that will be evident in the presentation - but do not mean to claim that no other schemas are.

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This section makes a two-stage argument. I demonstrate first, in sections III.A.1 and III.A.2, that rules can go morally awry - specifically, by violating the Liberty or Discrimination Schema. Moral reason can obtain to change, in some measure, the predicate of rules; this is true for each of the rules in our stylized cases. Then, in section III.A.3, I return to the puzzle with which we began the article, and which the facts of our stylized cases are meant to exemplify: How can it violate X's constitutional rights to sanction or coerce her pursuant to rule R, even though the very same action for which she is sanctioned, or which she is coerced not to perform, is properly sanctioned or coerced under another rule? I resolve this puzzle and explain all of the stylized cases, as follows: X's action can fall outside R<prime>, where R<prime> is the judicial revision of rule R<prime>' which the court issues after concluding that R breaches a constitutional rule- validity schema. The Direct Account proved unable to explain any of the stylized cases (except the B and W variants of Alcohol), [*98] but the Derivative Account explains each and every one of them in a plausible way.

One final preliminary point. I should emphasize that the notion of moral reason obtaining to change the predicate of rules - the notion I will flesh out in a moment, using the Liberty Schema and the Discrimination Schema - does not presuppose a particular normative theory of authority. Let me distinguish between (1) the nonmoral or "social" fact that state officials do take enacted legal rules in the U.S. legal system as authoritative, sanctioning actions that fall within these rules' scope by virtue of the rules' enactment; and (2) the moral fact that state officials ought to take enacted legal rules as authoritative, either because legal rules by their enactment create reasons for belief, or because legal rules by their enactment create reasons for action. n312 The Derivative Account presupposes (1) or something like it, but not (2), and is therefore neutral between the various normative theories of authority that explain why and to what extent (2) obtains. When, for example, the State of Texas has in force a legal rule prohibiting "procuring an abortion" - the rule that was challenged in Roe v. Wade, n313 and that Abortion stylizes - it is true as a matter of nonmoral fact that some Texan officials will prosecute women and doctors pursuant to this rule, whether or not these officials have moral reason to do so apart from, or together with, the rule's enactment. n314 Some women and doctors, anticipating their prosecution, will refrain from performing abortions that, all things considered, they ought to be at liberty to perform. Thus, moral reason obtains to invalidate Texas's rule in some measure (that is, moral reason obtains for a legal body, perhaps a court, to issue a legal utterance the Texan officials will take to deprive the invalidated rule of its authority), quite apart from the normative authority that the rule may truly have or lack. The idea of legal rules going morally awry, which grounds the Derivative Account, assumes that the enactment of legal rules changes the behavior of actors and state officials, to conform with the description of prohibited or required actions set forth by rule-predicates. [*99] Whether this change should morally occur, or indeed why precisely it does occur as a nonmoral fact, are matters that I need not address.

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n312. See Green, supra note 279, at 60 (distinguishing between de facto authority and legitimate authority); Raz, supra note 169, at 46 (same).

n313. 410 U.S. 113, 117-18 (1973).

n314. It is itself a general if not universal legal rule, at least within the federal system, that " 'adjudication of the constitutionality of [statutes is] beyond the jurisdiction of administrative agencies.' " Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994) (quoting Johnson v. Robison, 415 U.S. 361, 368 (1974)). This sort of basic rule limits the extent to which enforcement officials are (legally) permitted to inquire into the moral authority of the rules they enforce.

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1. The Liberty Schema

One way that rules can go morally awry is by violating liberties. Consider the case with which we began the article, and which I have stylized as Flag Desecration: Texas v. Johnson, where a flag- burner was sanctioned for violating a rule that provided, " 'A person commits an offense if he intentionally or knowingly desecrates ... a state or national flag.' " n315 This rule includes within its scope some otherwise-innocent speech-acts - speech-acts that are not harmful or wrongful apart from what they say. The rule includes, for example, the particular action of a flag-desecrator Y who spits upon and burns his own pollutant-free flag, within the confines of his own property, with no persons next to him but lots of offended onlookers. Y's action is not an action of battery, trespass, pollution, arson or destroying government property; it is simply an action of speech, and not harmful or wrongful beyond that.

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n315. 491 U.S. 397, 400 n.1 (1989) (quoting Tex. Penal Code Ann. 42.09 (West 1989)).

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But speech is one kind of constitutionally protected liberty. n316 To say this just means - on a standard and plausible account of "liberty" and, specifically, "free speech" - that there is sufficient, indeed strong moral reason that actors be left free to perform otherwise-innocent speech-acts, n317 excepting only speech-acts [*100] within a so-called "low-value" category (such as obscene speech, libel, incitement, or fighting words) n318 and, to some extent, excepting speech-acts within the category of "commercial speech." n319 As the Court stated in Texas v. Johnson: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." n320 Therefore, by virtue of the moral concept of "free speech" set forth in the First Amendment, there is sufficient moral reason to change the scope of the flag-desecration rule. For by keeping the rule fully in force, in its current form, otherwise-innocent actors within the scope of the rule - Y, and similar actors - are coerced not to speak. In particular, there is sufficient moral reason to narrow the rule, so as to exclude otherwise-innocent actions of flag-desecration; and likely there is sufficient moral reason to invalidate the rule entirely, because any actions of flag-desecration that are harmful or wrongful because of their nonexpressive properties will fall within the scope of the independent rules against "battery," "arson" and so forth. A similar analysis works readily for the rule in Child Pornography: some actions of photo-display are neither obscene nor nonexpressively harmful or wrongful, for example, the action of a loving parent who places a photo of a naked

infant in a family album, and displays the album to family members and close friends.

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n316. See U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech" (emphasis added)).

n317. See Feinberg, supra note 57, at 7-9 (defining liberty as absence of legal coercion; stating that "liberty should be the norm; coercion always needs some special justification"; and noting possibility of moral reasons that sometimes override liberty and justify coercion). The Liberty Schema I will present does not entail Feinberg's robust claim that liberties are only infringed by coercion - merely that coercion is one way of infringing them. The focus of this article just is duty-conferring rules backed by sanctions; my analysis, and the Liberty Schema, is agnostic on whether (pace Feinberg) other sorts of laws, e.g., laws denying benefits, can infringe liberties.

Nor does the Liberty Schema entail Feinberg's robust claim that every type of action is a "liberty" (in the sense of demanding some overriding reason to be coerced). See Dworkin, Taking Rights Seriously, supra note 1, at 266-72 (arguing against general right to liberty). Rather, the Liberty Schema entails the existence of certain act-types, such as speech-acts (or, more finely, political-speech-acts, or speech-acts-that-are-not-obscene, etc.), delineated by the liberty-protecting provisions of the Constitution, such that coercing actors not to perform these is morally and constitutionally impermissible, absent overriding reason.

And the standard explication of the First Amendment "free speech" clause - unlike, for example, the current doctrinal explication of the "free exercise" clause, see Employment Div. v. Smith, 494 U.S. 872 (1990) - does indeed construe the "free speech" clause as liberty- protecting, in this sense. It is seen, standardly, to be important that persons have the liberty to speak (or, more finely, that they have the liberty to perform certain types of speech-acts) - whether because of the intrinsic benefits for the speaker, or the instrumental benefits of speech in facilitating knowledge and democracy. For a survey and synthesis of standard "free speech" theory, see Thomas Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 878 (1963) (defending free speech as necessary inter alia "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, [and] (3) as a method of securing participation by the members of the society in social, including political, decision- making"); see also Frederick Schauer, Free Speech: A Philosophical Inquiry 15-72 (1982) (surveying, to some extent critically, the view that free speech serves truth, democracy, individual well-being, and individual autonomy).

n318. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (identifying main low- value categories); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) (same). The term "low value" should be used advisedly, since the properties that bring speech-acts within some of these categories might make those actions worthless, rather than merely overriding their worth. See infra note 329 (distinguishing between canceling and overriding properties).

n319. See Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 563-64 (1980) (setting out intermediate test for laws regulating commercial speech).

n320. 491 U.S. at 414.

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The idea I am articulating here - that free speech rights are violated by rules that include within their scope otherwise-innocent speech-acts - should be familiar to anyone acquainted with the Court's free speech jurisprudence. This idea is reflected, again and again, in the various free speech doctrines that require laws regulat [*101] ing speech to be more or less "narrowly tailored." n321 For example, under the strict scrutiny component of free speech doctrine (which is generally triggered by rules that pick out expressive properties of actions and that are "content based"), the State must show that the " 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " n322 Under the "time, place or manner" component of free speech doctrine (which is generally triggered by rules that pick out expressive properties of actions and that are "content neutral"), a law must be "justified without reference to the content of the regulated speech, [must be] narrowly tailored to serve a significant governmental interest, and [must] leave open ample alternative channels for communication of the information." n323 Under the "expressive conduct" component of free speech doctrine (which is generally triggered by rules that pick out nonexpressive properties of actions), a law must "further[ ] an important or substantial governmental interest; [must be] unrelated to the suppression of free expression; [and] the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." n324 Finally, under the "commercial speech" component of free speech doctrine (which is triggered by rules that pick out actions under the description of communicating a commercial message, e.g., as an "advertisement" or an action of "solicitation"), the " 'asserted governmental interest [must be] substantial [and] the regulation [must] directly advance[ ] the governmental interest asserted [and be no] more extensive than is necessary to serve that interest.' " n325

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n321. See Monaghan, supra note 44, at 37-38 (noting centrality of "least restrictive alternative" concept to First Amendment doctrine); Note, Less Drastic Means and the First Amendment, 78 Yale L.J. 464 (1969) (same, but criticizing concept).

n322. Boos v. Barry, 485 U.S. 312, 321 (1988) (emphasis added) (quoting Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983)).

n323. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (emphasis added).

n324. United States v. O'Brien, 391 U.S. 367, 377 (1968) (emphasis added).

n325. Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995) (emphasis added) (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 566 (1980)).

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Let me formalize, and make more rigorous, the idea that I take to be embodied in these various "narrow tailoring" doctrines underlying the free speech case law. A rule that includes speech-acts or other types of liberties within its scope must be narrowly tailored to a sufficiently important interest: that is, the rule-predicate must pick out some property of action such that, for the speech-acts or other liberties within the rule's scope, those encompassed liberties [*102] are connected to some harm or wrong sufficient to warrant prohibiting (or requiring) their performance. This is one schema or pattern for how rules might go morally awry; I will call it the Liberty Schema.

The Liberty Schema

A duty-imposing rule should be changed in scope (in particular, it should be narrowed, or invalidated entirely), if the duty includes within its current scope some subclass of "liberties" such that, all things considered, there is not sufficient reason to prohibit (or require) the performance of this subclass, under current law. "Liberties" are that class of actions, defined by the aggregate of liberty-protecting provisions in the Bill of Rights (free speech, substantive due process, ...), such that actors should be left free by government to perform actions within this class, absent sufficient reason. n326

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n326. Note that this definition is, strictly speaking, consistent both with the highly coarse- grained view of act individuation that I use in my analysis - for example, in speaking of "the very same" action being an action of speech and of battery, trespass, and arson - and with finer-grained views. See Moore, supra note 64, at 366-74 (discussing more or less coarse- grained views). A constitutional "liberty" delineates a complicated type of action. If an actor's performance of some instance of that type of action would violate a rule, then the rule includes liberties within its scope, whether one prefers to say that (1) the very same action of his would be an action of liberty, and an action of the kind identified in the rule-predicate; or (2) the very same bodily movement that would be the performance of the liberty, also would be the performance of the action identified in the rule-predicate. Because I see little to be gained, for purposes of my analysis, in (2), I stick to (1).

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Note a number of features of this schema designed to maximize its applicability. First, the schema leaves open why, precisely, a given type of action is understood to fall within the class of constitutional "liberties." It might be because the freedom to perform that type of action is important for the actor's own well-being (as on the familiar view that restricting X's freedom to speak violates her "autonomy"); n327 or it might be because the freedom to perform that type of action is important for the well-being of others (as on the familiar view that restricting X's freedom to speak deprives others of important information). n328 The schema also leaves open how, [*103] precisely, the class of "liberties" is defined. For example, one might define the speech portion of this class as (1) all speech-acts, or (2) all speech-acts except obscenity, incitement, libel, and "fighting words," or even (3) all speech-acts except obscenity, incitement, libel, and "fighting words," and except

speech-acts that are harmful or wrongful because of nonexpressive properties. The choice between these alternatives depends upon whether you think the act-properties enumerated in definitions two and three merely override the value of speech, or cancel it entirely. n329 Whatever the precise definition of the speech portion of the liberty-class, there is reason to invalidate, in some measure, the rules in Flag Desecration and Child Pornography.

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n327. For well-known statements of this sort of view, see C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964 (1978); and David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974).

n328. Alexander Meiklejohn's famous defense of free speech, which points to the centrality of political debate to democratic government, falls partly in this category - insofar as, within a Meiklejohnian theory, the moral importance of X's political statement lies (partly) in the information it brings X's interlocutors. See Alexander Meiklejohn, Political Freedom 24-28 (1960); see also Raz, supra note 169, at 245-63 (arguing that political liberties, such as liberty of speech, are often grounded in collective interests, and not merely in the interest of the actor).

n329. See Raz, supra note 54, at 27 (noting that "the notion of one reason overriding another should be carefully distinguished from that of a reason being canceled by a canceling condition").

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The Liberty Schema further leaves open what "sufficient reason" means - what kinds of considerations are morally sufficient for government to prohibit (or require) the performance of liberties. At a minimum, government can prohibit liberties and other actions if they seriously harm others: the subclass of speech-acts comprised by speech-acts-that-also-constitute-battery or speech-acts-that-also-constitute-arson are surely proscribable (at least under a non-discriminatory rule, a point we will return to below). But liberties and other actions may additionally, perhaps, be prohibited if they constitute some kind of harmless wrong: say, the wrong of defacing the graves of the dead. n330 Finally, there may be sufficient reason to prohibit a harmless and innocent subclass of liberties, under some rule R, if R also includes within its scope harmful or wrongful actions and there is no feasible way, given the epistemic limitations of state officials and actors, to exclude the subclass of harmless and innocent liberties without also excluding some of the proscribable actions. n331 This is why the Liberty Schema asks whether sufficient reason obtains to proscribe the subclass of liberties within a rule's scope, under current law. I recognize that, for a given subclass, the moral reasons to prohibit that subclass may depend upon, and be changed by, the shape of current law insofar as it covers other types of actions. One example is the one I just gave: [*104] where the epistemic limitations of actors and officials in identifying certain harmful or wrongful actions may justify a rule that picks out both these actions and certain liberties as well. n332 Another example is where the subclass of liberties produces only a marginal harm, but is part of a larger class of actions that together produce much harm; prohibiting the subclass may be justifiable only as part of a general prohibition on the larger class. n333

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n330. See Feinberg, supra note 57, at 10-14 (distinguishing between harm and harmless wrong).

n331. See Alexander, supra note 7, at 552 (noting that "'conduct unbecoming an officer' is a phrase sufficiently vague to cover and deter speech ... but the government's ... interest in deterring all conduct on the unprotected side of that line may justify a law that chills protected speech" (footnote omitted)).

n332. See also Adler, supra note 4, at 775 n.52 (noting that the moral propriety of rules may depend upon epistemic and other deficits of state institutions).

n333. It has become a truism within the literature on authority that the moral reasons against performing a particular action may depend upon whether other actions are prohibited. See Green, supra note 279, at 89-157 (discussing possible role of law in solving coordination problems and prisoners' dilemmas). For a possible example, within free speech case law, see Rubin v. Coors, 514 U.S. 476, 488-89 (1995) (invalidating ban on the disclosure of alcohol content by beer labels, notwithstanding government's argument that ban prevented "strength wars" in beer market, because no such ban existed for beer advertisements or for wine and spirit labels).

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I do not intend my Liberty Schema to resolve any of these interesting issues - the kind of issues that constitutional and moral theorists hotly debate. Rather, my intention is simply to articulate one straightforward way in which morality might require changing the scope of a rule. Whatever the theorist's specific view about the role of liberties in benefitting the actors versus benefitting others; about the kinds of actions that are indeed protected liberties; and about the kinds of considerations that justify prohibiting (or requiring) the performance of liberties, the theorist should be able to agree that the Liberty Schema can explain how rules go morally awry.

Further, and somewhat less fundamentally, I wish to suggest that the Liberty Schema in fact maps onto a good bit of the constitutional case law. First, I suggest that most (although not all) of the decisions in which the Court has found violations of the right to free speech fit the Liberty Schema. Most (although not all) of these cases involved rules that included within their scope some subclass of constitutionally protected speech-acts such that sufficient reason did not obtain to prohibit (or require) the performance of this subclass. This is true, I suggest, whether or not the Court explicitly invoked a "narrow tailoring" doctrine; it is true whether the claimant raised a retrospective challenge to a sanction, or a prospective challenge to a duty; it is true whether the rule at stake picked out expressive or nonexpressive properties of actions; it is true for cases involving all the different categories of speech, such as core speech, commercial speech, and "low-value" speech; and it is true both for so-called "facial" challenges under the First Amendment, and for so-called "as-applied" challenges. Consider some illustrative exam [*105] ples, drawn from the current case law, to supplement the Flag Desecration and Child Pornography examples.

Boos v. Barry: n334 a prospective challenge to a rule that the Court analyzed as content-based; n335 the rule prohibited the display of signs, within 500 feet of a foreign government's embassy, that bring that government into disrepute.

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n334. 485 U.S. 312 (1988).

n335. See Boos, 485 U.S. at 318-21 (discussing difference between content-based and content-neutral laws). This article will not attempt to analyze that distinction or take a position on its cogency. The distinction is a distinction within the broader category of laws that pick out expressive properties of actions.

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Ladue v. Gilleo: n336 a prospective challenge to a rule that the Court analyzed as content-neutral; the rule prohibited the display of residential signs.

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n336. 512 U.S. 43 (1994).

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*United States v. Eichman: n337 a retrospective challenge to a rule picking out nonexpressive properties of actions; the rule, passed by the federal government subsequent to Texas v. Johnson, prohibited the action of mutilating flags, independent of whether the mutilation was expressive. n338

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n337. 496 U.S. 310 (1990). Technically, the statute in Eichman made it unlawful to " 'mutilate[ ], deface[ ], physically defile[ ], burn[ ], maintain[ ] on the floor or ground, or trample[ ] upon any flag of the United States.' " Eichman, 496 U.S. at 314 (quoting Flag Protection Act of 1989, 18 U.S.C. 700(a)(1) (1994)). For simplicity, and without lack of generality, I describe and discuss Eichman as concerning a statute prohibiting flag mutilation.

n338. Cf. 496 U.S. at 315, 318 (noting that the challenged rule "proscribes conduct (other than disposal) that damages or mistreats a flag, without regard to the actor's motive, his intended message, or the likely effects of his conduct on onlookers" but applying strict scrutiny because the rule "cannot be 'justified without reference to the content of the regulated speech' " (quoting Boos, 485 U.S. at 320)). These two inquiries - (1) whether a rule picks out expressive properties of actions, and (2) whether a rule can be adequately justified independent of the expressive properties of actions within its scope - should be kept distinct. A rule may survive (1) but fail (2), as indeed was true of the rule in Eichman. The Liberty Schema makes good sense of this. To say that speech is a liberty means that persons should be free to speak, absent sufficient reason; it further and relatedly means that, in general, what they say is not a sufficient reason for restricting this liberty. A rule may restrict speech by picking out expressive act-properties (as in Texas v. Johnson) or nonexpressive properties (as in Eichman); in either event, the problem of

finding sufficient reason will come into play.

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Rubin v. Coors: n339 a prospective challenge to a rule regulating commercial speech; the rule prohibited the disclosure of alcohol content on beer labels.

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n339. 514 U.S. 476 (1995).

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Houston v. Hill: n340 a prospective challenge to a rule that imperfectly described a category of "low-value" speech-acts, in [*106] this case the category of fighting words; the rule prohibited interrupting a police officer in the performance of his duties.

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n340. 482 U.S. 451 (1987).

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In re R.M.J.: n341 a retrospective, as-applied case: the Court invalidated a rule prohibiting lawyer advertising, as applied to the claimant's advertisements.

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n341. 455 U.S. 191 (1982).

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For each one of these illustrative rules, one can readily show how the rule goes awry under the Liberty Schema. This is trivial in Boos and Ladue: some actions of displaying signs are independently harmful (for example, displaying a sign laced with poisonous evaporate); some actions of displaying signs fall within a "low-value" category (for example, displaying a sign with an obscene picture); but most are neither. A liberty analysis works readily for Eichman (some actions of flag-mutilation are both expressive and harmless apart from the disrespect they communicate), as well as for Coors and Houston.

Finally, my interpretation of In re R.M.J., the as-applied case, is as follows: This decision invalidated the no-advertising rule with respect to the class of actions bearing the features specified by the Court in its analysis of the claimant's advertisements, viz., truthful and non-misleading advertisements. n342 In short, on the Derivative Account, so-called "as-applied" decisions are simply partial invalidations. The no-advertising rule ran afoul of the Liberty Schema, by including truthful, non-misleading, and otherwise innocent advertisements within its scope. The Court partly invalidated the rule, so as to cure the rule's moral flaw. I will discuss the partial vs. facial invalidation issue at greater length below, in section III.A.3. The Derivative Account can readily accommodate partial invalidations; what it cannot accommodate is a true "as-applied" invalidation - that is, a judicial decision to overturn X's

sanction or duty independent of further invalidating rule R. So-called "as-applied" decisions must be interpreted, within the Derivative Account, as partial invalidations. The In re R.M.J. example is meant to show the plausibility of this interpretation.

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n342. See In re R.M.J., 455 U.S. at 205-07.

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In sum, the Liberty Schema explains much of the free speech case law. It also explains the entirety of the substantive due process case law. Substantive due process cases, like free speech cases, are standardly defended on the grounds that the Due Process Clause delineates a class of liberties in the sense of my schema: a class of actions that persons ought to be free to perform (at a minimum, [*107] free from government coercion) absent overriding reason. n343 This is the class of actions falling within what the Court, in Griswold, called the "zone of privacy." n344 The Court in Casey reaffirmed the status of such actions as constitutional liberties, albeit without using the term "privacy":

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n343. See Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 742-54 (1989) (summarizing, but criticizing, standard view and citing literature).

n344. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

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Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." ... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. n345

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n345. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (emphasis and citation omitted) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

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Here, as with free speech, the specifics of the class of liberties demarcated by Griswold, and reaffirmed by Casey, are open to debate - as are the specific moral grounds for counting the exercise of a liberty more important than (some range of) conflicting considerations. In particular, we might say that the

constitutional liberty of abortion would obtain even in a world of gender equality; or we might say, in line with some recent scholarship on the abortion right, that it now obtains by virtue of the existence of gender inequality. n346 Similarly, we might disagree about whether measures short of prohibiting abortion - for example, waiting periods and informed-consent provisions - count as infringing the liberty of abortion or not. n347

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n346. See Sunstein, supra note 304, at 279 ("The argument for an abortion right built on principles of sex equality is thus straightforward. Restrictions on abortion burden only women and are therefore impermissible unless persuasively justified in gender-neutral terms.... In our world [adequate justifications] are not [available] in light of the fact that the burden of bodily use, properly understood, is imposed only on women, [and] could not be enacted in the absence of unacceptable stereotypes about women's appropriate role ...."). Sunstein states: "Movements in the direction of sexual equality - before, during, and after conception, including after birth - unquestionably weaken the case for an abortion right." Id. at 280.

n347. See Casey, 505 U.S. at 881-87 (upholding requirement of informed consent and 24- hour waiting period).

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Bracketing these disagreements, it is quite straightforward to explicate the Due Process Clause as liberty-protecting, and to interpret the cases in which the Court has sustained substantive due pro [*108] cess claims as cases where the underlying rules violated the Liberty Schema. To give the leading examples:

Roe v. Wade: n348 the basis for Abortion; an anticipatory challenge to a rule that prohibited procuring an abortion.

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n348. 410 U.S. 113 (1973).

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Planned Parenthood v. Casey: n349 an anticipatory challenge to a rule that prohibited doctors from performing an abortion without obtaining spousal consent.

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n349. 505 U.S. 833 (1992).

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Griswold v. Connecticut: n350 a retrospective challenge by doctors to a rule that prohibited using contraceptives or assisting others in doing so.

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n350. 381 U.S. 479 (1965).

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And to give a case in which, many believe, the Court should have sustained the constitutional challenge:

Bowers v. Hardwick: n351 a prospective challenge to a rule prohibiting sodomy.

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n351. 478 U.S. 186 (1986).

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For each of these cases, one can readily say: the rule includes, within its scope, some subclass of liberties (where the Due Process Clause liberties are understood to include actions by physicians of prescribing contraceptives or performing abortions) n352 such that for this subclass, sufficient reason does not obtain, at least under current law, to prohibit them. And the doctrinal formulations that the Court has used in its substantive due process case law - not only the "narrow tailoring" doctrine invoked in the early cases, but also the "undue burden" standard invoked more recently in Casey n353 - can readily be understood as fleshing out the Liberty Schema.

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n352. See infra text accompanying notes 559-73 (discussing jus tertii).

n353. See Casey, 505 U.S. at 869-80. The shift to this standard seems largely meant to signal the acceptability of fetal life as a moral reason for pre-viability abortion requirements that are not too burdensome. Thus it signals a change in the Court's assessment of the moral reasons pro and con pre-viability abortion regulation, but not in the status of abortion as a liberty.

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*** My interpretive claims about the free speech and substantive due process case law are, to be sure, open to debate. In particular, one might argue that the central concept for free speech is discrimination, not liberty. After all, the Court surely does moot the problem of content- and viewpoint-discrimination in its cases; n354 and as [*109] we shall see below, there are some free speech decisions that can only be explained on a Discrimination Schema. For the discrimination theorist, the Free Speech Clause is centrally concerned with rules that set forth a morally irrelevant property - the property that the actor is speaking - rather than rules that include innocent speech-acts within their scope. n355 This theorist will interpret the pervasive "narrow tailoring" doctrines within free speech law as testing whether "discrimination" - understood broadly, to mean the enactment of rules targeting speech n356 - is justified, not as testing whether sufficient reason obtains to prohibit the speech-acts within a rule's scope. Thus, the discrimination theorist will not want to recognize free speech claims against rules that pick out nonexpressive properties of actions: for example, the rule in Eichman, or, to use the

clearer and classic example of Marsh v. Alabama, n357 a rule that prohibits "trespass" and is applied to the trespassory actions of protesters, religious proselytizers, and other speakers within the boundaries of a company town. And it will be a matter of indifference, for the discrimination theorist, whether a rule prohibiting some kind of speech is reworked by invalidating the rule, or instead by extending the prohibition to cover some larger category of actions that is defined in nonexpressive terms and that includes all of the actions within the scope of the original, speech-targeted rule. For example, the discrimination theorist will be satisfied if a rule prohibiting "political demonstrations within [*110] public parks" is broadened to prohibit "all activities that produce a noise level above sixty decibels within public parks," even though political demonstrations, stump speeches, and so forth cannot feasibly take place at a noise level below sixty decibels.

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n354. See Williams, supra note 226, at 622-24.

n355. See infra text accompanying notes 385-89 (discussing centrality of morally irrelevant properties to Discrimination Schema).

n356. This broad construal would be needed to make sense of the cases in which the Court strikes down "content-neutral" laws regulating speech, see, e.g., Ladue v. Gilleo, 512 U.S. 43 (1994). The discrimination theorist who wants to explain these cases will say that the potentially irrelevant property she is concerned with is the actor's property of speaking, and thus that a speech-targeted, content-neutral, but unjustified rule counts as "discriminatory" for her.

Alternately, she may think the cases striking down content-neutral laws are wrongly decided. Cf. Larry Alexander, Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory, 44 Hastings L.J. 921, 923 (1993) (arguing that courts should not strike down "track two" laws under the Free Speech Clause - laws "concerned with the noncommunicative impact of speech" - including laws picking out both nonexpressive and expressive properties).

n357. 326 U.S. 501 (1946) (overturning trespass conviction of Jehovah's Witness who distributed religious literature within "company town"). Admittedly, the Court in recent years has not struck down laws picking out nonexpressive properties, on free speech grounds, see Michael Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1175, 1200-11 (1996) (surveying case law), but the test for such laws remains an intermediate-scrutiny test, see Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293-99 (1984), and if the Liberty Schema truly reflects part of the content of "free speech," this test should not be a dead letter. Cf. Lee v. International Socy. for Krishna Consciousness, 505 U.S. 830 (1992) (per curiam) (invalidating ban on distribution of literature in airport terminals, despite alleged risks of congestion posed by distribution).

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I believe it is a mistake to view the Free Speech Clause as focused solely on discrimination. Standard moral accounts of free speech point to the benefits, for the actor X or her audience, of X's being free to engage in speech. n358 The concept of discrimination does not exhaust such accounts: the would-be

protester, stump speaker, or proselytizer is no less coerced by an applicable rule prohibiting trespass or noisemaking than by a speech-targeted rule. And, relatedly, it would not be a matter of indifference, within the standard accounts, for government to restrict speech that has low- level nonexpressive effects (producing noise, damaging the grass in the public parks, or intruding onto private property) by stringently regulating all activities with those effects. n359 Finally, the reason that rules picking out more serious nonexpressive act-properties - such as arson, battery, or pollution - do not violate First Amendment rights is simply that those harms are sufficiently serious to justify restricting speech-acts that produce them, particularly since it is (normally) n360 feasible for speakers to say what they want to in a less harmful manner.

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n358. See sources cited supra notes 317, 327-28.

n359. See, e.g., Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 222 (1972) ("The Millian Principle [that speech ought not be prohibited by virtue of harms that flow from the expressive properties of speech-acts] is obviously incapable of accounting for all of the cases that strike us as infringements of freedom of expression. On the basis of this principle alone we could raise no objection against a government that banned all parades and demonstrations (they interfere with traffic), outlawed posters and handbills (too messy), banned public meetings of more than ten people (likely to be unruly), and restricted newspaper publication to one page per week (to save trees). Yet such policies surely strike us as intolerable.").

n360. See Clark, 468 U.S. at 293 (stating that "time, place, or manner" restrictions on expression are valid if, inter alia, they leave open "ample alternative channels for communication"); 468 U.S. at 298 (stating that the "time, place, or manner" test is little different from the test under United States v. O'Brien, 391 U.S. 367 (1968), for the "regulation of expressive conduct," i.e., for laws picking out nonexpressive act-properties).

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The best argument for reducing the Free Speech Clause to an antidiscrimination principle, and for dispensing with a separate liberty principle here, is that judicial attempts to protect the liberty of speech are self-defeating. The argument might be expressed as follows: The Liberty Schema entails judicial balancing of the nonexpressive harms and wrongs that speech-acts cause against the value of speech; yet this sort of balancing is the very kind of governmen [*111] tal valuation of speech that the First Amendment prohibits. n361 But if it violates the First Amendment for courts to distinguish between the serious nonexpressive wrongs and harms that justify prohibiting speech, and the less serious nonexpressive wrongs and harms that do not, then a fortiori it should violate the First Amendment for courts to distinguish between different categories of expression, say, between obscene and non-obscene speech, n362 or between recklessly false and non-recklessly false statements about public figures, n363 or between misleading and non-misleading advertisements. n364 The implication of this argument against the Liberty Schema is that courts should automatically strike down any law picking out expressive act-properties. Unless that implication is correct - and I do not believe it is - a Liberty Schema for speech is not self-defeating.

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n361. See Alexander, supra note 356, at 932 (claiming that "the value of speech cannot be balanced against the government's track two interests in any way that is principled and that respects the very freedom of thought that the First Amendment itself protects"). There is also a standard critical line that disputes the special role of speech, as opposed to nonexpressive conduct, in self-fulfillment, see Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971), but this critique leaves untouched the argument for a constitutional liberty, at least, of political speech.

n362. See Miller v. California, 413 U.S. 15 (1973).

n363. See New York Times v. Sullivan, 376 U.S. 254 (1964).

n364. See Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557 (1980).

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What about a discrimination account of the abortion case law? One might argue that legislators are typically confused or mistaken about the moral relevance of the act-property "abortion" (for example, because legislators are motivated by religious views about abortion, which ought not figure in its regulation n365); that courts invalidate no-abortion laws only by virtue of their greater competence to determine the moral relevance of this act-property; and therefore that a rule must target abortion in order to trigger the Due Process Clause. On this account, a rule requiring all abortions to be performed in hospitals rather than clinics might be unconstitutional; but a rule requiring all medical procedures to be performed in hospitals rather than clinics would not be unconstitutional, even as applied to the medical procedure of aborting a fetus. n366 Indeed, given the distinct moral features of abortion - the involvement of a fetus - a liberty account of the abortion right may be problem [*112] atic. n367 But a general reduction of substantive due process case law from liberty to discrimination is neither doctrinally required (by contrast with the parallel reduction for free exercise) nor morally warranted. The idea of a zone of "privacy" - at a minimum, of self-regarding choices such that the freedom to make these is normally constitutive of autonomy (self-authorship) and fundamental to well-being - is morally plausible, indeed compelling. n368

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n365. Cf. Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom 10-29 (1993) (arguing that opposition to abortion is plausibly grounded not in "derivative" view that fetus has rights and interests, but in "detached" view that life is sacred).

n366. See Dorf, supra note 357, at 1219-33 (discussing incidental burdens on right to privacy).

n367. Cf. Sunstein, supra note 304, at 272 (claiming that "those who stress 'liberty' [in defending the abortion right] seem to have no way to respond to those who believe that abortion involves the death of a human being").

n368. On self-regarding choices, see Donald VanDeVeer, Paternalistic Intervention: The Moral Bounds of Benevolence 58-63 (1986). On autonomy as self-authorship, and the connection between autonomy and well-being, see Raz, supra note 169, at 369-99. I include the "self-regarding" proviso here to make the notion of a distinct zone of privacy maximally plausible; whether that proviso is truly needed is a separate question, see Laurence Tribe, American Constitutional Law 1302-14 (2d ed. 1988), which I leave open by saying that "at a minimum" self-regarding choices fall within the zone.

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Liberty, not just discrimination, is central to free speech and substantive due process jurisprudence. n369 But even if I am incorrect in advancing this claim, my error does not undermine the Derivative Account or the project of interpreting the constitutional case law within it. If the Liberty Schema is misplaced, then the right response is to reinterpret Abortion, Child Pornography, Flag Desecration, and the jurisprudence these stylized cases exemplify, within a second schema for how rules go morally awry. The best objections to a libertarian reading of free speech and substantive due process are objections that simply propel us forward - to a different, but equally derivative and rule-centered understanding of the moral content of constitutional rights. I call this the Discrimination Schema.

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n369. In saying this, I do not mean to ignore the possibility that the Liberty and Discrimination schema might overlap. A rule might go awry both because (1) the rule includes liberties within its scope without sufficient reason, and (2) the rule is discriminatory (in a sense to be made more precise below). Indeed, this may be true of most rules that give rise to successful free speech or abortion claims. But the moral difficulties with such doubly problematic rules will not be exhausted by their discriminatory cast; and extending their prohibitory scope will not (normally) be a moral cure. For a case that clearly illuminates this point, see Ladue v. Gilleo, 512 U.S. 43, 51-59 (1994) (invalidating rule prohibiting residential signs, but not under "discrimination" rationale, because such rationale would leave open possibility of curing rule by broadening it).

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2. The Discrimination Schema

My claim has been that the Liberty Schema lays bare the moral content of constitutional rights in the large portion of the free speech case law epitomized by the stylized cases, Flag Desecration and Child Pornography, and in the entirety of the substantive due process case law, as epitomized by Abortion. But what of [*113] the remaining stylized cases: Alcohol, Animal Sacrifice, and Residential Picketing? Alcohol is drawn directly from the Court's decision in Craig v. Boren, n370 and exemplifies the current structure of equal protection doctrine: it is close to a necessary condition for a successful equal protection claim that the rule-predicate employ a "suspect" act-property (such as race or gender) or, failing that, employ an act-property that is deliberately selected by the legislature to match the scope of a "suspect" property. n371 Animal Sacrifice is drawn directly from the Court's decision in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, n372 and exemplifies the current

structure of free exercise doctrine, which is now isomorphic to equal protection doctrine. n373 Unless and until the Court reverses its holding in the watershed Smith case, n374 it will be a necessary condition for a successful free exercise challenge that the rule-predicate pick out actions by virtue of their religious cast, or, failing that, be designed to fall along religious lines. As the Court explained in Smith:

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n370. 429 U.S. 190 (1976) (holding gender-discriminatory ban on alcohol sales unconstitutional under Equal Protection Clause).

n371. See supra text accompanying notes 98-108 (discussing current structure of equal protection doctrine).

n372. 508 U.S. 520 (1993) (holding unconstitutional, under Free Exercise Clause, ordinance that prohibited animal killing and was targeted at Santeria religion).

n373. See supra text accompanying notes 109-13 (discussing current structure of free exercise doctrine).

n374. See Employment Div. v. Smith, 494 U.S. 872 (1990); City of Boerne v. Flores, 117 S. Ct. 2157, 2160-61 (1997) (reaffirming Smith).

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The right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." n375

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n375. Smith, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). I note, again, the special proviso for neutral laws that allow for individualized exemptions. See supra note 110. The existence of this proviso does not suffice to bring free exercise jurisprudence within the Liberty Schema. If religiously motivated actions were constitutional "liberties" in the sense I've defined, i.e., a type of action that persons must be constitutionally free to perform absent sufficient reason, then a neutral law with no allowance for individualized exemptions could readily encompass and constitutionally infringe such liberties.

Why not argue that Smith is wrongly decided, and that the Free Exercise Clause creates "liberties," no less so than the Free Speech Clause and the substantive component of the Due Process Clause? See Laycock, supra note 306, at 313 ("Religious liberty is first and foremost a guarantee of liberty."). Smith may indeed be wrongly decided, but my basic claim here is that the Liberty Schema and the Discrimination Schema make sense of the Supreme Court's jurisprudence on free speech, free exercise, equal protection, and substantive due process, and fit with plausible construals of the underlying moral criteria. That claim does not depend upon Smith's being wrong, and so I will not argue